DOCKET

No. 08-267
Title: United States, Petitioner
v.
Jacob Denedo
Docketed: August 29, 2008
Lower Ct: United States Court of Appeals for the Armed Forces
Case Nos.: (07-8012)
Decision Date: March 11, 2008
Rehearing Denied: April 4, 2008
Questions Presented

---Date---	-------Proceedings and Orders----------
Jun 23 2008	Application (07A1027) to extend the time to file a petition for a writ of certiorari from July 3, 2008 to August 2, 2008, submitted to The Chief Justice.
Jun 23 2008	Application (07A1027) granted by The Chief Justice extending the time to file until August 1, 2008
Jul 21 2008	Application (07A1027) to extend further the time to file a petition for a writ of certiorari from August 1, 2008 to September 1, 2008, submitted to The Chief Justice.
Jul 21 2008	Application (07A1027) granted by The Chief Justice extending the time to file until August 29, 2008.
Aug 29 2008	Petition for a writ of certiorari filed. (Response due September 29, 2008)
Sep 11 2008	Order extending time to file response to petition to and including October 27, 2008.
Oct 27 2008	Brief of respondent Jacob Denedo in opposition filed.
Nov 10 2008	DISTRIBUTED for Conference of November 25, 2008.
Nov 12 2008	Reply of petitioner United States filed. (Distributed)
Nov 25 2008	Petition GRANTED.
Jan 9 2009	Brief of petitioner United States filed.
Jan 9 2009	Joint appendix filed.
Jan 26 2009	SET FOR ARGUMENT ON Wednesday, March 25, 2009.
Jan 29 2009	CIRCULATED.
Feb 9 2009	Brief of respondent Jacob Denedo filed. (Distributed).
Feb 17 2009	Brief amici curiae of Former Judge Advocates General, et al. filed. (Distributed)
Feb 17 2009	Brief amici curiae of Law Professors filed. (Distributed)
Feb 20 2009	Record received from the U.S. C. A. for the Armed Forces. (1 box)
Mar 11 2009	Reply of petitioner United States filed. (Distributed)
Mar 25 2009	Argued. For petitioner: Pratik A. Shah, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Matthew S. Freedus, Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis filed by a former service member to review a court-martial conviction that has become final under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a-60a) is reported at 66 M.J. 114. The order of the Navy-Marine Corps Court of Criminal Appeals (App., *infra*, 62a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2008. A petition for reconsideration was denied on April 4, 2008. App., *infra*, 61a. On June 23, 2008, the Chief Justice extended the time within which

to file a petition for a writ of certiorari to and including August 1, 2008, and on July 21, 2008, the Chief Justice further extended the time to August 29, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(4).

STATUTES INVOLVED

Pertinent provisions are set out in an appendix to this petition. App., *infra*, 68a-81a.

STATEMENT

This case concerns the statutory jurisdiction of the military courts—created by Congress pursuant to Article I of the Constitution—to entertain collateral challenges by former service members to court-martial convictions that have long since become final. Following a guilty plea before a special court-martial, respondent was convicted of conspiracy to commit larceny, in violation of 10 U.S.C. 881, and 15 specifications of larceny, in violation of 10 U.S.C. 921. He was sentenced to three months of confinement, a bad-conduct discharge from the Navy, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence as adjudged. The Navy-Marine Corps Court of Criminal Appeals (N-MCCA) affirmed the findings and sentence. Respondent did not seek further review, and he was discharged from the Navy. Seven years later, respondent petitioned the N-MCCA for a writ of error coram nobis, alleging that he had received ineffective assistance of counsel. The N-MCCA denied the petition, but—by a 3-2 decision—the United States Court of Appeals for the Armed Forces (CAAF) reversed and remanded for an evidentiary hearing.

1. The Constitution empowers Congress "[t]o make rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14. Congress

has exercised that authority in the Uniform Code of Military Justice (UCMJ), which governs the conduct of, among others, "[m]embers of a regular component of the armed forces." 10 U.S.C. 802(a)(1).

Exercising that Article I authority, Congress has also established a military justice system that embraces three tiers of tribunals. See *Weiss* v. *United States*, 510 U.S. 163, 166-169 (1994). First, persons charged with violations of the punitive articles of the UCMJ are tried by courts-martial. See 10 U.S.C. 816-821. Unlike a federal district court, a court-martial is not a standing trial court but is convened to hear a particular case. See 10 U.S.C. 822-824. Its jurisdiction terminates when the officer who has convened the court-martial has acted on the findings and sentence in the case. See Rule for Courts-Martial (R.C.M.) 1102(d).

Second, each of the armed forces possesses a court of criminal appeals. See 10 U.S.C. 866. The courts of criminal appeals have jurisdiction to review the judgment of a court-martial when the sentence, as approved by the officer who convened the court-martial, extends to death, a punitive discharge, or confinement for one year or more. See 10 U.S.C. 866(b).

Third, the CAAF, an Article I court composed of five civilian judges, has jurisdiction to review all cases reviewed by the courts of criminal appeals. See 10 U.S.C. 867; 10 U.S.C. 941 *et seq.* Under UCMJ Article 71, 10 U.S.C. 871(c), "[a] judgment as to legality of the proceedings is final" when review is completed by a court of criminal appeals and by the CAAF, and when the time for filing a petition for a writ of certiorari has expired. Under UCMJ Article 76, 10 U.S.C. 876, following the completion of authorized review provided by the UCMJ, a court-martial sentence imposed and executed on an

appellant by military order is "final and conclusive" and "binding upon all departments, courts, agencies, and officers of the United States, subject only to" three specified exceptions: a petition for a new trial under UCMJ Article 73, 10 U.S.C. 873; action by the relevant service Secretary under UCMJ Article 74, 10 U.S.C. 874; and the President's authority.

In addition, the results of courts-martial within that military justice system are subject to collateral review by Article III courts. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 750-753 (1975); App., *infra*, 6a-7a.

2. Respondent, a native and citizen of Nigeria, came to the United States in 1984 and enlisted in the Navy in 1989. In 1998, military authorities charged him with conspiracy, larceny, and forgery based on his participation in a scheme to defraud a community college. Represented by both a military and a civilian attorney, respondent entered into a pretrial agreement with the convening authority. In exchange for respondent's plea of guilty, the convening authority agreed to reduce the charges and to refer the case to a special court-martial, which at the time could not impose a sentence of confinement exceeding six months. App., *infra*, 3a.

After conducting an inquiry to determine that respondent's plea was knowing and voluntary, the military judge accepted the plea and convicted respondent of conspiracy and larceny. Respondent was sentenced to three months of confinement, a bad-conduct discharge, and reduction to the lowest enlisted pay grade. App., *infra*, 3a-4a. The convening authority approved the sentence, and the N-MCCA affirmed. *Id.* at 64a-67a. Respondent did not seek further review, and he was discharged from the Navy on May 30, 2000. *Id.* at 4a.

In 2006, the Department of Homeland Security initiated removal proceedings against respondent based upon his court-martial conviction. After removal proceedings began, respondent petitioned the N-MCCA for a writ of error coram nobis to review his conviction. He alleged that he had received ineffective assistance of counsel because, he said, his civilian attorney had assured him that pleading guilty would eliminate any risk of deportation. App., *infra*, 4a-5a. The N-MCCA determined that it had jurisdiction to consider respondent's petition, but it denied relief on the merits. *Id.* at 62a-63a.

3. The CAAF reversed by a 3-2 vote. App., *infra*, 1a-60a.

a. The CAAF held that the issuance of a writ of error coram nobis was authorized by the All Writs Act, 28 U.S.C. 1651(a), which allows courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Ibid.*; App., *infra*, 7a-21a. In reaching that conclusion, the court first considered whether the requested writ was "in aid of" the N-MCCA's jurisdiction. It determined that because the petition concerned "the validity and integrity of the judgment rendered and affirmed" by the N-MCCA, it was "in aid of" that court's jurisdiction. *Id.* at 8a-9a. The court acknowledged that in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), this Court held that the CAAF "is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." App, *infra*, 7a (quoting 526 U.S. at 536). But the court believed that *Goldsmith* was inapplicable here, and it reasoned that where a petition seeks "collateral relief to

modify * * * the findings or sentence of a court martial, a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." *Id.* at 8a. The court acknowledged that UCMJ Article 76, 10 U.S.C. 876, provides that the decision on direct review of a court-martial decision is "final and conclusive," but it held that Article 76 "provides a prudential constraint on collateral review, not a jurisdictional limitation." App., *infra*, 9a.

The CAAF next considered whether relief under the All Writs Act was "necessary or appropriate." App., *infra*, 11a-21a. It stated that "[a]n Article III court, when asked to consider a court-martial conviction on an issue that has not been fully and fairly reviewed within the military justice system and has not been defaulted procedurally, is likely to defer action pending review by the court that approved the conviction." *Id.* at 20a. That is because, the court reasoned, "the primary responsibility for addressing challenges to courts-martial resides with the courts in the military justice system established by Congress." *Ibid.* Accordingly, the court concluded that "the Court of Criminal Appeals provides an appropriate forum for coram nobis review." *Ibid.*

Turning to the facts of this case, the CAAF determined that respondent's claim of ineffective assistance of counsel met "the threshold criteria for coram nobis review." App., *infra*, 24a. It therefore remanded the case to the N-MCCA to "determine whether the merits of [respondent's] petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required." *Id.* at 32a.

b. Judge Stucky dissented. App., *infra*, 32a-39a. He believed that the court's "authority to grant the requested relief" was "questionable," but he found it un-

necessary to reach that issue because, in his view, respondent's claim of ineffective assistance failed on the merits. *Id.* at 35a.

c. Judge Ryan dissented. App., *infra*, 40a-60a. She started with the understanding that the CAAF, "as a legislatively created Article I court, is a court of limited jurisdiction" whose "limited powers are defined entirely by statute." *Id.* at 43a. In addition, drawing from this Court's decision in *Goldsmith*, she observed that "the express terms of the [All Writs] Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Id.* at 43a (quoting *Goldsmith*, 526 U.S. at 534-535).

In Judge Ryan's view, the military courts lacked statutory jurisdiction to consider respondent's petition because respondent is a civilian who no longer has any relationship with the military. Under UCMJ Articles 2 and 3, 10 U.S.C. 802, 803, she explained, "the military justice system does not have jurisdiction over civilians." App., *infra*, 44a. Judge Ryan concluded that respondent, as "a *former* servicemember lawfully discharged from military service," has "no legally cognizable relationship with the military justice system." *Id.* at 45a. And, she explained, "[i]t is contrary to the limited nature of a legislatively created Article I court to exercise jurisdiction over a person not specifically prescribed by statute." *Ibid.*

In addition, Judge Ryan argued that the UCMJ precludes post-finality collateral review. App., *infra*, 46a-48a. Articles 66 and 67, 10 U.S.C. 866, 867, which provide for direct review of court-martial decisions, make "no mention of, and thus no provision for, post-finality collateral review." App., *infra*, 48a. To the contrary,

she explained, under Article 76, 10 U.S.C. 876, "once appellate review is complete, the findings and sentence are 'final and conclusive'" with "[n]o exception * * * for writs of coram nobis or other collateral review." App., *infra*, 50a. Although Article 76 "describe[s] the terminal point for proceedings within the court-martial system," *id.* at 51a (quoting *Schlesinger*, 420 U.S. at 750), Judge Ryan observed that it does not deprive Article III courts of authority to review court-martial convictions. *Ibid.* Thus, she concluded that the appropriate forum for any collateral review in a case such as this is an Article III court. *Ibid.*

REASONS FOR GRANTING THE PETITION

By a 3-2 vote, the CAAF has held that the military courts of criminal appeals possess continuing jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to grant collateral relief to former service members whose court-martial convictions have become final and whose sentences have been ordered executed. That decision contravenes this Court's decision in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), key provisions of the UCMJ governing the jurisdiction of the military appellate courts, and established principles governing the limited jurisdiction of Article I courts. And it follows in a line of decisions —including *Goldsmith*—in which the CAAF has overstepped its statutory bounds.

As a statutory court, the CAAF's jurisdiction is limited to the authority conferred by Congress. In *Goldsmith*, this Court held that Congress has "confined the [CAAF's] jurisdiction to the review of specified sentences imposed by court-martial" and that the All Writs Act does not expand that jurisdiction. 526 U.S. at 534. Here, however, the CAAF asserted jurisdiction to con-

sider collateral attacks on final court-martial convictions, even though no provision of the UCMJ authorizes the exercise of such jurisdiction. Indeed, as Judge Ryan explained, collateral review is affirmatively prohibited by the provisions of the UCMJ governing the finality of convictions and generally limiting the jurisdiction of military courts to current—not former—service members. Although this case involves a judgment that once could have been reviewed by the CAAF, "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Id.* at 536.

Moreover, even if there were some jurisdictional basis for collateral review of final court-martial judgments after a conviction has become final and a service member has been discharged, the particular procedural vehicle for collateral review that the CAAF adopted—a writ of error coram nobis—is not "necessary or appropriate" under the All Writs Act. It is not necessary because, as this Court has recognized, there are several available remedies by which former service members may collaterally attack their court-martial convictions in Article III courts. And it is not appropriate because a writ of error coram nobis permits a court to correct only its own errors, not those of an inferior tribunal. Further, while courts have adopted certain limits on the reach of that writ, it is particularly problematic in a military justice system that emphasizes "final[ity]," 10 U.S.C. 876, because of the writ's temporal range and unsettled legal standards.

The decision below warrants this Court's review because its reasoning not only departs from this Court's decisions and Congress's enactments on a fundamental question of jurisdiction, but also affords the armed services' appellate courts essentially unlimited discretion to

undertake collateral review of any court-martial conviction over which they once possessed jurisdiction. The result of that broad and unfounded assertion of authority is to impose upon the military justice system administrative and judicial burdens that it was not designed by Congress to bear and to degrade its ability to perform its intended function as the arbiter of discipline within the armed forces. Certiorari is therefore appropriate.

A. Collateral Review Of A Final Court-Martial Judgment Is Not "In Aid Of" The Jurisdiction Of A Military Appellate Court

1. In *Goldsmith*, this Court reaffirmed that the All Writs Act is not an independent jurisdictional grant: it confers authority to issue "process 'in aid of' the issuing court's jurisdiction," but it "does not enlarge that jurisdiction." 526 U.S. at 534-535 (quoting 28 U.S.C. 1651(a)). The Court also held that Congress has "confined the [CAAF's] jurisdiction to the review of specified sentences imposed by courts-martial," and therefore that court "has the power to act 'only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.'" *Id.* at 534 (quoting 10 U.S.C. 867(c)) (brackets in original). Applying those principles, the Court concluded that the CAAF lacked jurisdiction under the All Writs Act to enjoin the President from dropping from the rolls an Air Force officer who had been sentenced by a court-martial to a term of confinement but not to dismissal from the service. *Id.* at 531. Even though the officer had received a court-martial sentence that did not include a dismissal, the Court explained that "the CAAF is not given authority, by the All Writs Act or otherwise,

to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." *Id.* at 536.

2. The CAAF's decision in this case cannot be reconciled with this Court's decision in *Goldsmith*, which makes clear that "the CAAF's independent statutory jurisdiction is narrowly circumscribed." 526 U.S. at 535. Indeed, as Judge Ryan observed, the CAAF's decision in this case "is troubling not so much because it is misplaced, but because it is highly reminiscent of the position of this Court prior to the Supreme Court's decision in [*Goldsmith*]." App., *infra*, 54a. "Inexplicably," she continued, "this Court appears determined not to heed the Supreme Court's unequivocal directive that it stay squarely within the express limits of statutory jurisdiction." *Id.* at 56a.

Specifically, Article 67 of the UCMJ authorizes the CAAF to "review the record in [certain] cases reviewed by" the courts of criminal appeals, while Article 66 authorizes the courts of criminal appeals to "review[] court-martial cases." 10 U.S.C. 867, 866. Nothing in Articles 66 or 67 confers jurisdiction on those courts to entertain collateral attacks on final judgments and discharges ordered into execution that have reached finality under Article 76. Instead, as Judge Ryan explained, the statutes provide only for direct review of court-martial convictions. App., *infra*, 46a; see *Witham* v. *United States*, 355 F.3d 501, 505 (6th Cir. 2004) ("[N]either the Uniform Code of Military Justice nor the Manual for Courts-Martial provides for collateral review within the military courts.").

The CAAF did not purport to find collateral-review authority in Articles 66 and 67, but it reasoned that "when a petitioner seeks collateral relief to modify an

action that was taken within the subject matter jurisdiction of the military justice system, * * * a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." App., *infra*, 8a. But *Goldsmith* makes clear that "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." 526 U.S. at 536. The same is true of the military courts of appeals. That the CAAF and the N-MCCA were at one time vested with jurisdiction to review the findings and sentence in respondent's case provides no basis for asserting continuing jurisdiction over the case—seven years after respondent's conviction and sentence became final.

Indeed, the CAAF's exercise of jurisdiction in this case not only had no statutory support; it was affirmatively prohibited by the finality provisions of the UCMJ. Under Article 71, a "judgment as to legality of the [court-martial] proceedings is final * * * when review is completed by a Court of Criminal Appeals" and by the CAAF and when the time for seeking certiorari has expired. 10 U.S.C. 871(c)(1). Article 76 provides an additional kind of finality once military orders have been issued to carry out the court-martial sentence. It states that "[t]he appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive," "subject only" to three exceptions: (1) "action upon a petition for a new trial" under Article 73, (2) "action by the Secretary concerned" to remit or suspend the sentence

under Article 74, and (3) "the authority of the President." 10 U.S.C. 876. Unless a case is still pending, a petition for a new trial must be directed to the Judge Advocate General, not to a court. See 10 U.S.C. 873; App., *infra*, 53a (Ryan, J., dissenting).

None of the three statutory exceptions to finality provides any role for the CAAF or the N-MCCA, and the fact that Congress expressed specific exceptions in the UCMJ underscores that it did not intend for the courts to create additional exceptions of their own. Once respondent's conviction was "final" under Article 76, neither court possessed statutory jurisdiction "in aid of" which an extraordinary writ could issue. As Judge Ryan explained, the contrary conclusion reached by the CAAF "eviscerates" the statutory scheme established by Congress and "renders Article 76, UCMJ's * * * finality provision meaningless." App., *infra*, 54a.

Under the decision below, the All Writs Act effectively provides a fourth exception to the final-judgment rule of Article 71 and the finality rule of Article 76. That result is inconsistent with the principle that "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *Pennsylvania Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 43 (1985)); see *Trenkler* v. *United States*, 2008 WL 2941573, at *9 (1st Cir. Aug. 1, 2008) ("[C]ommon-law writs, including the writ of error coram nobis, [are] available only to fill whatever interstices exist in the post-conviction remedial scheme."); cf. *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007) ("[A] precisely drawn, detailed statute pre-empts more general remedies.") (quoting *Brown* v. *GSA*, 425 U.S. 820, 834 (1976)).

3. The CAAF relied upon *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), for the proposition that Article 76 is merely a "prudential constraint," not "a jurisdictional limitation," but its reliance on that decision was misplaced. App., *infra*, 9a. In *Councilman*, the Court rejected an argument that Article 76 barred Article III courts from issuing writs of habeas corpus to review court-martial convictions. The Court noted that Article 76 "does not expressly effect any change in the subject-matter jurisdiction of Art. III courts." 420 U.S. at 749. But that observation about the statutory jurisdiction of *Article III* courts has no bearing on the jurisdiction of *military* (*i.e.*, Article I) courts. To the contrary, *Councilman* recognized that "the finality clause" of Article 76 "describ[es] the terminal point for proceedings within the court-martial system." 420 U.S. at 750 (quoting *Gusik* v. *Shilder*, 340 U.S. 128, 132 (1950)). As the CAAF is part of the "court-martial system," Article 76 is not merely a "prudential constraint," App., *infra*, 9a, but "a statutory directive" that forecloses the continued exercise of jurisdiction, *id.* at 51a (Ryan, J. dissenting).

The CAAF emphasized that *Councilman* cited *United States* v. *Frischholz*, 36 C.M.R. 306 (C.M.A. 1966), a case in which the former Court of Military Appeals—the predecessor of the CAAF—held that it had authority under the All Writs Act to grant extraordinary writs. App., *infra*, 10a. But *Councilman* cited *Frischholz* only for the proposition that Article 76 "does not insulate a conviction from subsequent attack in an appropriate forum." 420 U.S. at 753 n.26 (quoting *Frischholz*, 36 C.M.R. at 307). This Court had no occasion to consider *Frischholz*'s broader holding that the Court of Military Appeals was "an appropriate forum" for the issuance of writs of error coram nobis. See also App., *infra*, 33a

(Stucky, J., dissenting) ("[I]t is one thing to state that this Court has authority to issue writs under the All Writs Act and quite another to conclude that that authority includes a general mandate to correct errors in cases that are final by means of coram nobis."). Likewise, when this Court again cited *Frischholz* in *Noyd* v. *Bond*, 395 U.S. 683 (1969), it did so only for the limited proposition that the Court of Military Appeals could "issue an emergency writ of habeas corpus in cases * * * which may ultimately be reviewed by that court." *Id.* at 695 n.7. That principle does not apply here: because this is not a case that "ultimately may be reviewed" by any military court, there is no ongoing or future jurisdiction that a writ of error coram nobis could "aid."

4. The CAAF lacked jurisdiction for the additional reason that, as Judge Ryan observed, respondent is "a *former* servicemember lawfully discharged from military service pursuant to a court-martial conviction [who] has no current relationship with the military." App., *infra*, 45a. Indeed, as Judge Ryan observed, that dimension of the CAAF's decision "flies in the face of Supreme Court precedent, the decisions of at least two federal circuit courts of appeal, and the position, for the past fifty-seven years, of the solicitors general of the United States as agents of the President, commander in chief of the armed forces." *Id.* at 40a; see *id.* at 40a-41a (citing authorities).

Congress's power to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, allows it "to subject persons actually in the armed service to trial by court-martial for military and naval offenses." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955). But "[i]t has never

been intimated by this Court * * * that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions." *Ibid.*; see William Winthrop, *Military Law and Precedents* 89 (2d ed. 1920) ("It is the *general rule* that the person is amenable to the military jurisdiction only during the period of his service as an officer or soldier," and that jurisdiction "ends with * * * discharge or mustering out.").

Consistent with that constitutional limitation, the UCMJ does not apply to persons who have been punitively discharged from the armed forces under a military order, except for persons who are in custody of the armed forces serving a sentence imposed by a court-martial, see 10 U.S.C. 802(a)(7), and, in certain cases, deserters and persons who procured their discharge by fraud, see 10 U.S.C. 803(b) and (c).[1] Because the CAAF and the military courts of appeals form part of the military justice system, their jurisdiction cannot extend to discharged service members whose convictions are final and who have no remaining connection to the military. And the CAAF's jurisdiction therefore does not extend to respondent, who, on the day he was discharged from the Navy in 2000, became "a civilian, completely detached from the military and the military justice system." App., *infra*, 45a (Ryan, J., dissenting).

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[1] A discharge issued during ongoing appellate proceedings does not terminate the jurisdiction of the military appellate courts pending completion of the UCMJ's appellate procedures. See *United States* v. *Davis*, 63 M.J. 171, 176 (C.A.A.F. 2006) ("Once jurisdiction attaches, it continues until the appellate processes are complete.") (quoting *United States* v. *Entner*, 36 C.M.R. 62, 62 (C.M.A. 1965)).

B. Coram Nobis Review Is Neither Necessary Nor Appropriate In Light Of The Alternative Remedies Available To Former Members Of The Armed Forces

Even if the N-MCCA had some jurisdictional basis for collaterally reviewing final court-martial judgments, the issuance of a writ of error coram nobis in this case is not permissible under the All Writs Act because it is neither "necessary" nor "appropriate." The All Writs Act, this Court has held, "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Goldsmith*, 526 U.S. at 537. In this context, the availability of alternative remedies for former service members seeking to challenge their court-martial convictions makes coram nobis unnecessary. Additionally, issuance of the writ by an appellate court to review a trial court's judgment long after a conviction became final is inappropriate because it is inconsistent with the traditional scope of the writ and incompatible with the demands of a system of military justice.

1. This Court has observed that "it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate." *Carlisle*, 517 U.S. at 429 (quoting *United States* v. *Smith*, 331 U.S. 469, 476 n.4 (1947)) (brackets in original). That point applies with even greater force in the military context, for even without resort to coram nobis, a former service member has several avenues for challenging a court-martial conviction. The most common avenue for review is a habeas petition in an Article III court under 28 U.S.C. 2241 (2000 & Supp. V 2005). As the Court noted in *Goldsmith*, "once a criminal conviction has been finally reviewed within the military system, and a servicemember in custody has exhausted

other avenues provided under the UCMJ to seek relief from his conviction * * * he is entitled to bring a habeas corpus petition." 526 U.S. at 537 n.11; see *Councilman*, 420 U.S. at 750; *Gusik*, 340 U.S. at 132-133.

Even in cases where the former service member is no longer in custody, there are sufficient alternative remedies to foreclose recourse to coram nobis relief. For example, federal courts have entertained collateral challenges to court-martial convictions under their general federal-question jurisdiction and under their authority to grant declaratory judgments or mandamus relief. See, *e.g.*, *United States ex rel. New* v. *Rumsfeld*, 448 F.3d 403, 406-407 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 2096 (2007); *Davis* v. *Marsh*, 876 F.2d 1446, 1448 & n.4 (9th Cir. 1989); *Baker* v. *Schlesinger*, 523 F.2d 1031, 1034-1035 (6th Cir.), cert. denied, 424 U.S. 972 (1975). In addition, former service members who allege that their discharge was unlawful may bring actions for backpay in the Court of Federal Claims. See 28 U.S.C. 1491; *Goldsmith*, 526 U.S. at 539; *Councilman*, 420 U.S. at 751; *Matias* v. *United States*, 923 F.2d 821, 823 (Fed. Cir. 1990) ("We have long honored the rule that 'judgments by courts-martial, although not subject to direct review by federal civil courts, may nevertheless be subject to narrow collateral attack [in the Court of Federal Claims] on constitutional grounds' when traditional Tucker Act jurisdiction is present.") (quoting *Bowling* v. *United States*, 713 F.2d 1558, 1560 (Fed. Cir. 1983)).[2]

The court below justified its assertion of coram nobis jurisdiction on the theory that, even after a court-martial conviction has become final, Article III courts will

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[2] In certain cases, former service members may also seek review of their discharge from the Board for Correction of Military Records. See 10 U.S.C. 1551 *et seq.*; *Goldsmith*, 526 U.S. at 538-539.

abstain from entertaining claims for collateral review pending exhaustion of available remedies within the military justice system. App., *infra*, 16a-17a. But as Judge Ryan explained, *id.* at 58a-59a, an exhaustion rule cannot invest the military courts with collateral jurisdiction that they otherwise would lack. If the CAAF has no continuing jurisdiction in a case that is final under Article 76, then a failure to exhaust military remedies would not be an obstacle to review by an Article III court. Thus, coram nobis review in the military courts cannot be said to be necessary.

2. The N-MCCA's exercise of coram nobis jurisdiction is inappropriate for the additional reason that the writ permits a court to correct *its own* errors, not to correct those of an inferior court. As the Second Circuit has explained, "[t]he term '*coram nobis*' * * * comes from the phrase 'error *quae coram nobis resident*,' which means, literally, an error 'which remains in our presence.'" *Finkelstein* v. *Spitzer*, 455 F.3d 131, 133 (2006) (citations omitted), cert. denied, 127 S. Ct. 1125 (2007). Thus, the common-law writ "was used by a court in cases within its own jurisdiction, not to correct errors in other jurisdictions." *Ibid.* (holding that federal court cannot issue coram nobis to set aside a state-court judgment); see *United States* v. *Morgan*, 346 U.S. 502, 507 n.9 (1954) ("[I]f there be error in the *process*, or through the default of the *clerks*, it may be reversed in the same court, by writ of error *coram nobis*.") (quoting 2 *Tidd's Practice* 1136 (4th Amer. ed. 1856)); *Lowery* v. *McCaughtry*, 954 F.2d 422, 423 (7th Cir.) ("Coram nobis is an established writ, but the 'usages and principles of law' send an applicant to the court that issued the judgment.") (citations omitted), cert. denied, 506 U.S. 834 (1992); *Booker* v. *Arkansas*, 380 F.2d 240, 244 (8th Cir.

1967) ("Relief by the writ * * * is available, if at all, only in the court which rendered the judgment.").

Neither the CAAF nor the N-MCCA was the court that rendered the judgment in this case: the judgment was entered by a court-martial. As Judge Ryan noted, however, courts-martial are not standing bodies like Article III courts, but are convened to hear particular cases. App., *infra*, 53a n.9. Because they are "ad hoc proceedings which dissolve after the purpose for which they were convened has been resolved," they are incapable of considering petitions for collateral relief. *Witham*, 355 F.3d at 505; see *United States* v. *DuBay*, 37 C.M.R. 411, 413 n.2 (C.M.A. 1967); R.C.M. 1102(d). The CAAF recognized the inability of courts-martial to issue writs of error coram nobis, App., *infra*, 17a-18a, and it concluded that "the Courts of Criminal Appeals * * * provide an appropriate forum for consideration of coram nobis petitions," *id.* at 19a. That conclusion is inconsistent with the common-law scope of the writ, and it is therefore not an "appropriate" exercise of the authority granted by the All Writs Act.

The writ of error coram nobis is also fundamentally incompatible with a military justice system that emphasizes "finality" in order to instill discipline critical to the maintenance of a well-trained armed force. See 10 U.S.C. 871(c)(1), 876. While the courts have adopted certain common law limits on the scope of the writ, the availability of relief remains subject to unsettled legal standards. Indeed, as this Court has recognized, petitions for extraordinary relief such as a writ of error coram nobis "are not subject to any time limitations and, theoretically, could be filed at any time without limitation." *In re Sindram*, 498 U.S. 177, 180 (1991); see App., *infra*, 54a (Ryan, J., dissenting). That uncertainty—

which distinguishes the writ of coram nobis even from other forms of collateral review, such as habeas—is particularly problematic in a system of military justice.

C. The Question Presented Is Important And Warrants This Court's Review

1. This case concerns a matter of fundamental importance with respect to the authority of the military courts created by Congress. Moreover, the decision below contravenes *Goldsmith* and the statutory provisions governing the CAAF's jurisdiction, and also imposes on the military justice system a burden of considering petitions for collateral relief that the system was not designed by Congress to bear. The result not only will undermine the finality and discipline that Congress intended to instill when it established that system, but also will divert the resources of the armed forces from their primary duty of protecting the nation to the adjudication of claims that are properly the province of the Article III courts.

"This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society," and that military law, correspondingly, "is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Parker* v. *Levy*, 417 U.S. 733, 743-744 (1974) (quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)). Whereas the sole function of Article III courts is to adjudicate cases, "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth*, 350 U.S. at 17. The "trial of soldiers to maintain discipline," although necessary, "is merely incidental to an army's primary fighting function," and when "those responsible for performance

of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Ibid.*

Recognizing the danger of diverting the armed forces from their principal function, Congress made no provision in the UCMJ for collateral review of court-martial convictions. Although it provided for direct review in military courts, it confined post-finality challenges within the military system to motions for a new trial, and it imposed strict time limits on such motions. See 10 U.S.C. 873. At the same time, Congress left it to the Article III courts to adjudicate motions for collateral review. See *Councilman*, 420 U.S. at 749-751. Particularly when the conviction is final and the defendant has been discharged from the armed forces, such proceedings are not even remotely "incidental to an army's primary fighting function." *Toth*, 350 U.S. at 17.

The CAAF's decision disrupts that sensible division of responsibility between the military and civilian courts, and it will have the effect of diverting the limited resources of the military justice system from its role of fostering discipline and readiness to an unwieldy proceeding wholly unanticipated by its statutory charter. As reflected by the CAAF's disposition of this case, collateral challenges to court-martial convictions often require fact-finding. App., *infra*, 32a. Here, for example, resolution of the merits of respondent's ineffective-assistance claim will require factual findings concerning what advice respondent's civilian attorney provided him, and whether respondent's decision to enter pleas of guilty was predicated on such advice. But no provision of the UCMJ prescribes procedures for litigating such factual issues long after convictions become final. As a result, the CAAF was required to improvise "an unwieldy and

imperfect system" for post-conviction fact-finding by the assignment of the case to a court-martial convening authority with instructions to convene an evidentiary hearing. App., *infra*, 47a (Ryan, J. dissenting); see *DuBay*, 37 C.M.R. at 412 (establishing procedures, within the military justice system, for fact-finding with respect to post-conviction claims based on disputed facts not contained in the trial record). That procedure will require a senior commander, members of his staff, a military judge, a trial counsel, and a military defense counsel to divert their attention from the fulfillment of their primary responsibilities to the resolution of factual claims made by a petitioner who long ago severed all ties with the military.

Even in cases where post-conviction claims can be addressed without recourse to an evidentiary hearing, the government will be required to appoint defense counsel at its expense to represent a now-civilian petitioner. See 10 U.S.C. 870(c)(2). As this Court has noted, when petitioners "are not subject to the financial considerations," such as attorney's fees, "that deter other litigants from filing frivolous petitions," they have a "greater capacity than most to disrupt the fair allocation of judicial resources." *In Re Sindram*, 498 U.S. at 180. Moreover, "[t]he risks of abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation." *Ibid.*

In cases, like this one, where the petitioner has been discharged, the military justice system is particularly ill-suited to fulfil the role envisioned by the CAAF. Although the former service member will likely be an essential witness in a fact-finding proceeding, he is not

subject to military jurisdiction or to the orders of the commander convening the court-martial. App., *infra*, 49a (Ryan, J., dissenting). Here, for example, respondent is a civilian over whom neither the convening authority nor the military courts would appear to have personal jurisdiction. In view of that status, it is uncertain whether he could be compelled to participate in any fact-finding proceeding.

In addition, to the extent that they did participate in such proceedings, former service members who already had been discharged for unlawful conduct would have to be permitted to re-enter the military base where the proceedings were conducted. Exposing current service members to such individuals may itself create disciplinary problems. Moreover, while present for the proceedings they would be immune from the demands of military discipline and requirements of conduct that otherwise govern members of the military community who are present on the military installations where the proceedings would likely be conducted. In the tightly controlled environment of a military installation, such a disruption of discipline and order could prove problematic even in individual cases.

2. The role of the CAAF and the military courts of appeals in the military justice system is important, but it is also limited, and *Goldsmith* makes clear that the CAAF does not have a general power to superintend all matters relating to military justice. The decision below represents the latest iteration of that court's efforts to expand its role beyond its congressionally prescribed jurisdiction to "review * * * specified sentences imposed by courts-martial." *Goldsmith*, 526 U.S. at 534; see, *e.g.*, *United States* v. *Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) (permitting appeals to the CAAF from

the decisions of the Courts of Criminal Appeals in interlocutory appeals by the government); *United States* v. *Tamez*, 63 M.J. 201 (C.A.A.F. 2006) (permitting extension, for "good cause," of the statutory deadline for filing appeals to the CAAF); *Loving* v. *United States*, 62 M.J. 235 (C.A.A.F. 2005) (asserting jurisdiction under the All Writs Act to entertain petitions for habeas corpus after there is a final judgment); *Kreutzer* v. *United States*, 60 M.J. 453 (C.A.A.F. 2005) (employing All Writs Act to regulate defendant's place of confinement); *Goldsmith* v. *Clinton*, 48 M.J. 84 (C.A.A.F. 1998) (employing All Writs Act to enjoin the government from administratively discharging Air Force Officer), rev'd, 526 U.S. 529 (1999). This Court's intervention is warranted, once again, in order to confine the CAAF to its statutory jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Misc. No. 07-8012
Crim. App. No. 99-00680

JACOB DENEDO, MESS MANAGEMENT SPECIALIST
SECOND CLASS U.S. NAVY, APPELLANT

v.

UNITED STATES, APPELLEE

Argued: Oct. 1, 2007
Decided: Mar. 11, 2008

EFFRON, C.J., delivered the opinion of the Court, in which Baker and Erdmann, JJ., joined. Stucky and Ryan, JJ., each filed a dissenting opinion.

Military Judge: GERALD E. CHAMPAGNE.

Chief Judge EFFRON delivered the opinion of the Court.

Appellant filed a petition for extraordinary relief with the United States Navy-Marine Corps Court of Criminal Appeals. The court considered his petition and denied relief. *Denedo v. United States*, No. NMCCA 9900680 (N-M. Ct. Crim. App. Mar. 26, 2007). Appellant then filed the present appeal.

For a writ appeal, we consider the record developed at trial and on direct appeal. We also consider the materials filed by the parties in the course of the writ proceedings at the Court of Criminal Appeals and the appeal to our Court. Based on the foregoing, we consider whether a decision on the writ appeal can be reached on the record before us, or whether a more fully developed factual record is required prior to reaching a decision on the merits. *See* Section III.C.2., *infra*.

The Government contends that the Court of Criminal Appeals erred by not dismissing the petition on jurisdictional grounds, while Appellant contends that the court erred by not granting relief. Appellant challenges his court-martial conviction, asserting that his plea was not knowing or voluntary. Appellant contends that he expressly requested guidance of counsel on the immigration impact of his plea, that the advice provided by his attorney was defective, and that he relied upon ineffective assistance of counsel to his detriment in pleading guilty. He further asserts that the defect in counsel's advice was not known to him and could not have been known to him until eight years after conviction when the United States Citizenship and Immigration Services (USCIS) first sought to deport him based on his court-martial conviction. Although judicial review of immigration proceedings, including any use therein of a court-martial conviction, is outside the jurisdiction of this Court, the providence of a guilty plea at a court-martial is subject to our review. *See* Section III.B., *infra*.

For the reasons set forth below, we conclude that the Court of Criminal Appeals properly rejected the Government's motion to dismiss. We further conclude that a more fully developed record is required prior to reach-

ing a decision on the merits, and we remand the case for further consideration by the Court of Criminal Appeals.

Section I of this opinion outlines the procedural history of the present case. Section II discusses collateral review under the All Writs Act. Section III addresses Appellant's request for relief.

I. PROCEDURAL HISTORY

Appellant, who was born in Nigeria, came to the United States in 1984. He enlisted in the Navy in 1989 and became a lawful permanent resident in 1990.

In 1998, the Government charged Appellant with conspiracy, larceny, and forgery, alleging that he assisted a civilian acquaintance in defrauding a community college. *See* Articles 81, 121, 123, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 921, 923 (2000). Appellant, who was represented by civilian counsel and detailed military counsel, entered into a pretrial agreement with the convening authority. In exchange for Appellant's agreement to enter a guilty plea, the convening authority agreed to reduce the charges. The convening authority also agreed to refer the case to a special court-martial, which, at that time, could not impose a sentence of confinement in excess of six months. *See* Article 19, UCMJ, 10 U.S.C. § 819 (1994), *amended by* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 577, 113 Stat. 512, 625 (1999) (prospectively providing a twelve-month maximum for periods of confinement adjudged by special courts-martial).

Pursuant to the pretrial agreement, Appellant entered a plea of guilty at a special court-martial composed of a military judge sitting alone. In accordance with applicable law, the military judge conducted an inquiry

into the providence of the plea. *See* Article 45, UCMJ, 10 U.S.C. § 845 (2000); Rule for Courts-Martial (R.C.M.) 910; *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969). After conducting the inquiry, the military judge concluded that the plea was provident. The military judge entered findings of guilty for the charges of conspiracy and larceny, as limited by the pretrial agreement. The record contains no reference to the subject of the deportation consequences of the pleas. Following the entry of findings, the military judge conducted a sentencing proceeding. On July 15, 1998, the military judge imposed a sentence that included three months confinement, reduction to grade E-1, and a bad-conduct discharge. The convening authority approved the sentence on March 7, 1999. The Navy-Marine Corps Court of Criminal Appeals affirmed on February 24, 2000. *United States v. Denedo*, No. NMCA 99-00680 (N-M. Ct. Crim. App. Feb. 24, 2000). Appellant did not seek further review in our Court. The Navy discharged Appellant on May 30, 2000.

On October 30, 2006, the Government, through USCIS, initiated proceedings to deport Appellant, citing his 1998 special court-martial conviction.[1] Subsequently, Appellant filed a petition for extraordinary relief with the Navy-Marine Corps Court of Criminal Appeals, requesting collateral review of his court-martial for alleged ineffective assistance of counsel and issuance of a writ of error coram nobis under the All Writs Act, 28 U.S.C. § 1651(a) (2000). Appellant's petition alleged that he specifically told his counsel during plea negotiations

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[1] During the present writ appeal, USCIS filed an additional deportation charge, also based upon Appellant's special court-martial conviction.

that "his primary concern and objective" was "to avoid the risk of deportation," and that he was "far more concerned about deportation and being separated from his family, than the risk of going to jail." According to Appellant's petition, his counsel had assured him that "if he agreed to plead guilty at a special-court-martial he would avoid any risk of deportation."

At the Court of Criminal Appeals, the Government filed a motion to dismiss on the grounds that the court lacked jurisdiction to consider the writ. The Court of Criminal Appeals denied the Government's motion to dismiss. *Denedo*, No. NMCCA 9900680. The court also considered and denied Appellant's petition for extraordinary relief in a summary decision. *Id.*

Appellant filed a writ appeal with this Court. The Government, in response, reiterated its jurisdictional objection. In addition, the Government contended that Appellant had been provided with the effective assistance of counsel at his court-martial.

II. COLLATERAL REVIEW

A. BACKGROUND

In a court-martial of the type at issue in the present case, the findings and sentence approved by the convening authority are subject to direct review by the Court of Criminal Appeals of the military department concerned. Article 66(b), UCMJ, 10 U.S.C. § 866(b) (2000); *cf.* Article 69, UCMJ, 10 U.S.C. § 869 (2000) (providing for review of other courts-martial in the Office of the Judge Advocate General). In addition to issues of law, the scope of review at the Court of Criminal Appeals extends to factual sufficiency and sentence appropriateness. *See* Article 66(c), UCMJ. The decisions of the

Court of Criminal Appeals are subject to direct review in this Court on issues of law. Article 67(a), (c), UCMJ, 10 U.S.C. § 867(a), (c) (2000). Cases in which we have granted review or have otherwise provided relief are subject to direct review in the Supreme Court by writ of certiorari. Article 67a, UCMJ, 10 U.S.C. § 867a (2000); 28 U.S.C. § 1259 (2000).

A judgment as to the legality of the proceedings becomes final upon the completion of direct review by the Court of Criminal Appeals and (1) expiration of the time for filing a petition for review with this Court without such a filing (and without the case otherwise being under review at this Court); (2) rejection of a petition for review by this Court; or (3) completion of review by this Court, subject to requirements regarding potential review by the Supreme Court. Article 71(c)(1), UCMJ, 10 U.S.C. § 871(c)(1) (2000). In addition, various forms of executive action are required before the results of a court-martial become final. *See* Article 71(a), (b), (c)(2), UCMJ. Once such action is taken, Article 76, UCMJ, 10 U.S.C. § 876 (2000), provides, in pertinent part, that "[o]rders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States," subject to certain explicit exceptions.

The results of courts-martial are subject to collateral review by courts outside the military justice system. *See, e.g., Burns v. Wilson*, 346 U.S. 137 (1953) (plurality opinion) (habeas corpus in Article III courts); *Schlesinger v. Councilman*, 420 U.S. 738, 751 (1975) (noting that various forms of collateral review historically have been available for courts-martial convictions); *United*

States ex rel. New v. Rumsfeld, 448 F.3d 403, 406 (D.C. Cir. 2006 (federal question under 28 U.S.C. § 1331); *Matias v. United States*, 923 F.2d 821, 823, 825 (Fed. Cir. 1990) (back pay litigation under the Tucker Act, 28 U.S.C. § 1491). Courts-martial also are subject to collateral review within the military justice system. *See, e.g., Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005); cf. *Schlesinger*, 420 U.S. at 753 n.26 (describing collateral review by extraordinary writs in the military justice system).

Appellant has requested collateral review under the All Writs Act, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act requires two separate determinations: first, whether the requested writ is "in aid of" a court's jurisdiction; and second, whether the requested writ is "necessary or appropriate."

B. COLLATERAL REVIEW IN AID OF THE JURISDICTION OF THE COURTS OF CRIMINAL APPEALS

As the Supreme Court observed in *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999), "although military appellate courts are among those empowered to issue extraordinary writs under the Act," the Act confines a court to issuance of process in aid of "its existing statutory jurisdiction" and "does not enlarge that jurisdiction." The Supreme Court noted that this Court "is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." *Id.* at 536. The Court

added that "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Id.*

When courts within the military justice system lack subject matter jurisdiction over an action, such as an administrative separation, they cannot invoke the All Writs Act to enlarge their jurisdiction to review the administrative action, even if it is based upon the results of a court-martial. *Id.* (noting that "Goldsmith's court-martial sentence has not been changed; another military agency has simply taken independent action"). However, when a petitioner seeks collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court-martial, a writ that is necessary or appropriate may be issued under the All Writs Act "in aid of" the court's existing jurisdiction. *Loving*, 62 M.J. at 245-46 (citing 28 U.S.C. § 1651(a), and *Goldsmith*, 526 U.S. at 534).

The existing statutory jurisdiction of the Navy-Marine Corps Court of Criminal Appeals includes cases such as Appellant's, in which the sentence extends to a punitive discharge. Article 66(b), UCMJ. On direct appeal, the Court of Criminal Appeals conducts a de novo review of the findings and sentence approved by the convening authority. Article 66(c), UCMJ (providing for review of matters of fact and law, as well as sentence appropriateness). Appellant's request for coram nobis relief is limited to the findings and sentence of the court-martial reviewed by the Court of Criminal Appeals. He has raised a claim—ineffective assistance of counsel—that goes directly to the validity and integrity of the

judgment rendered and affirmed. As such, the petition was "in aid of" the existing jurisdiction of the Court of Criminal Appeals.

C. ARTICLE 76 AND COLLATERAL REVIEW

As noted in Section II.A., *supra*, Article 76 addresses the completion of direct review, including executive action. Article 76 provides in pertinent part:

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

In *Schlesinger*, 420 U.S. at 745, the Supreme Court emphasized that Article 76 provides a prudential constraint on collateral review, not a jurisdictional limitation. Article 76 "does not expressly effect any change in the subject-matter jurisdiction of Article III courts." *Id.* at 749. The Article "only defines the point at which military court judgments become final and requires that they be given res judicata effect." *Id.*

Similar considerations apply to the application of Article 76 within the military justice system. Although *Schlesinger* involved a collateral challenge to a pending court-martial in an Article III court, the Supreme Court's analysis of the relationship between Article 76 and collateral review specifically cited a post-Article 76 coram nobis case reviewed by this Court. *See Schlesinger*, 420 U.S. at 753 n.26 (quoting *United States v. Frischholz*, 16 C.M.A. 150, 151, 36 C.M.R. 306, 307 (1966)); *see also Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969) (observing that this Court in *Frischholz* "properly rejected" the government's argument that this Court lacked power to grant writs under the All Writs Act); *cf. Goldsmith*, 526 U.S. at 537 n.11 (referring to the discussion in *Noyd*, 395 U.S. at 693-99, of the various avenues of relief available within the military justice system). In terms of timing, Article 76 serves as a prudential restraint on collateral review of courts-martial pending completion of direct review. When a coram nobis petition is considered after completion of direct review, finality of direct review enhances rather than diminishes consideration of a request for collateral relief. *See, e.g., United States v. Morgan*, 346 U.S. 502, 511-12 (1954); *see* Section III, *infra*. In terms of the scope of collateral review, the res judicata effect of Article 76 means that the decision on direct review will stand as final unless it fails to pass muster under the highly constrained standards applicable to review of final judgments, as discussed in the following sections.

D. THE AVAILABILITY OF OTHER REMEDIES AS A LIMITATION ON RELIEF UNDER THE ALL WRITS ACT

Because the All Writs Act serves as a residual authority, a writ is not "necessary or appropriate" under the statute if another adequate legal remedy is available. *See Loving*, 62 M.J at 247, 253-54 (discussing *Carlisle v. United States*, 517 U.S. 416 (1996)). The determination of whether another remedy is adequate requires a contextual analysis. The possibility of executive clemency, for example, does not provide an adequate remedy because the exercise of clemency powers does not ensure judicial review of legal issues. *See id.* at 247. Likewise, a motion for a new trial is not a remedy if the request for extraordinary relief is based on developments occurring after the two-year deadline in Article 74, UCMJ, 10 U.S.C. § 874 (2000).

In view of the potential for collateral review by courts outside the military justice system, *see* Section II.A., *supra*, the question arises as to whether the availability of such review renders review of a coram nobis petition by the Court of Criminal Appeals unnecessary or inappropriate. In *Loving*, we observed that Article III courts would be unlikely to exercise jurisdiction over petitions for extraordinary relief during the period between completion of final legal review under Article 71(c) and finality of proceedings on direct review under Article 76 because of doctrines such as exhaustion and abstention, reflecting the primary role of courts within the military justice system in reviewing challenges to courts-martial. 62 M.J. at 248-51. In that context, we concluded that review was available under the All Writs Act to consider a court-martial conviction and sentence

that was challenged during the period between completion of final legal review under Article 71(c) and the completion of final review, including executive actions, under Article 76. *Id.* at 256. In the present case, we consider the relationship between extraordinary writ proceedings within the military justice system and the possibility of Article III collateral review in a post-Article 76 setting, a matter that we did not address in *Loving*. *See id.* at 245 n.61.

1. *Constraints on collateral review by courts outside the military justice system*

The power of courts outside the military justice system to engage in post-Article 76 collateral review is subject to constraints on the exercise of that power. *See Loving*, 62 M.J. at 248-49. A prominent theme running through the Supreme Court's consideration of military justice cases on collateral review is that the system of courts established by Congress for the military justice system should serve as the primary mechanism for review of court-martial cases, and that the courts within the military justice system should have an opportunity to consider challenges to court-martial proceedings prior to review by courts outside the military system. This theme is reflected in the Supreme Court's emphasis on exhaustion of military remedies, as well as the Court's focus on full and fair consideration by the courts within the military justice system.

a. Exhaustion of remedies

Under the exhaustion of remedies doctrine, courts outside the military justice system normally refrain from collateral review of courts-martial until all available military remedies are exhausted. The doctrine re-

flects the Supreme Court's view of the pivotal role assigned by Congress to the courts in the military justice system. As the Court stated in *Schlesinger*, Congress enacted the UCMJ under its power to regulate the armed forces in an effort "to balance . . . military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted." 420 U.S. at 757-58. To address those competing interests, "Congress created an integrated system of military courts and review procedures." *Id.* at 758.

The Supreme Court further observed that "implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task." *Id.* Underscoring the need for other courts to refrain from review until all military remedies have been exhausted, the Court stated "[w]e think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights." *Id.*

As a general matter, courts outside the military justice system "will not entertain habeas petitions by military prisoners until all available military remedies have been exhausted." *Id.* The exhaustion requirement is prudential rather than jurisdictional, and the Supreme Court did not preclude the possibility that the circumstances of a particular case might warrant consideration of a habeas petition by an Article III court prior to exhaustion. *Id.* at 761.

b. Full and fair consideration

Even when remedies have been exhausted, the scope of collateral review outside the military justice system is constrained by the requirement to consider whether the military justice system has given full and fair consideration to the claims at issue. *Burns*, 346 U.S. at 142-46. De novo review is appropriate only if the military justice system "manifestly refused to consider those claims." *Id.* at 142. As recently noted by the United States Court of Appeals for the District of Columbia Circuit in *New*, 448 F.3d at 407-08, Article III courts have utilized various standards in applying *Burns*. *Compare, e.g., Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990) (applying the deference test articulated by the United States Court of Appeals for the Fifth Circuit in *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975)), with *Brosius v. Warden*, 278 F.3d 239, 245 (3d Cir. 2002) (applying the deference standard that the court would have used in habeas review of a state court conviction under 28 U.S.C. § 2254(d)). Irrespective of the different approaches used by the Article III courts, they are obligated to apply the exhaustion and review standards of *Schlesinger* and *Burns* when considering claims raised by a petitioner on collateral review.

2. *The relationship between courts within and outside the military justice system with respect to collateral review*

As previously described, courts within the military justice system conduct extraordinary writ review of courts-martial at a variety of stages, including after completion of direct review under Article 76. Although not prohibited from undertaking collateral review at the post-Article 76 stage without considering the availability

of relief within the military justice system, a number of Article III courts have deferred action because of, or otherwise have taken into account, the availability of post-Article 76 collateral review within the military justice system.

In *Frischholz*, 16 C.M.A. at 151, 36 C.M.R. at 307, the petitioner's conviction became final under Article 76 after we denied his petition for direct review and he was dismissed from the Air Force. Five years later, he sought collateral relief from the United States District Court for the District of Columbia. *Id.* at 151, 36 C.M.R. at 307. The district court dismissed the petition, indicating that he should first seek review on the merits from this Court, a suggestion apparently initiated by the government. *See id.* at 151, 36 C.M.R. at 307.

When Frischholz followed the district court's suggestion and filed a petition for a writ of error coram nobis with this Court, the government changed its position, contending that the case was outside this Court's statutory jurisdiction under Article 67, and that we could not review a case after it became final under Article 76, UCMJ. *See id.* at 151, 36 C.M.R. at 307. We rejected the government's position, concluding that we had jurisdiction to review the case under the All Writs Act, and we denied the application for relief on its merits. *Id.* at 152-53, 36 C.M.R. at 308-09.

The Supreme Court subsequently cited with approval the conclusion in *Frischholz* that Article 76 does not bar "subsequent attack in an appropriate forum" and that "[a]t best it provides finality only as to interpretations of military law" by this Court. *See Schlesinger*, 420 U.S. at 753 n.26 (quoting *Frischholz*, 16 C.M.A. at 151, 36 C.M.R. at 307); *see also Noyd*, 395 U.S. at 695 n.7 (citing

Frischholz as an example of the availability of review by this Court under the All Writs Act).

In *Del Prado v. United States*, 23 C.M.A. 132, 133-34, 48 C.M.R. 748, 749-50 (1974) (collateral review where petitioner was not in confinement), and *Garrett v. Lowe*, 39 M.J. 293, 294 (C.M.A. 1994) (collateral review where petitioner was in confinement), petitioners first sought relief in federal district court after their cases had become final under Article 76. In each case, the district courts withheld action pending collateral review in this Court, and in both cases we undertook review and granted relief. *Del Prado*, 23 C.M.A. at 134, 48 C.M.R. at 750; *Garrett*, 39 M.J. at 297.

More recently, a number of federal district courts have continued to rely upon the availability of collateral review in the military justice system to dispose of petitions seeking collateral relief. *See, e.g., Tatum v. United States*, No. RDB-06-2307, 2007 U.S. Dist. LEXIS 61947, at *12-*13, 2007 WL 2316275, at *6-*7 (D. Md. Aug. 7, 2007) (dismissing a request for post-Article 76 collateral relief on the grounds that the petitioner had not sought a writ of error coram nobis before this Court); *Fricke v. Sec'y of the Navy*, No. 03-3412-RDR, 2006 U.S. Dist. LEXIS 36548, at *9-*11, 2006 WL 1580979, at *3-*5 (D. Kan. June 5, 2006) (relying on this Court's summary disposition of petitioner's post-Article 76 request for coram nobis relief); *MacLean v. United States*, No 02-CV-2250-K (AJB), 2003 U.S. Dist. LEXIS 27219, at *13-*15 (S.D. Cal. June 6, 2003) (dismissing a petition for coram nobis relief for lack of jurisdiction and noting the availability of such relief before the Court of Criminal Appeals); *Parker v. Tillery*, 1998 U.S. Dist. LEXIS 8399, at *3-*5, 1998 WL 295574, at *2 (D. Kan. May 22,

1998) (post-Article 76 coram nobis review in the military justice system demonstrated full and fair review of claim).

The foregoing cases illustrate the care taken by Article III courts to ensure that an issue has been considered by the courts within the military justice system established by Congress prior to outside collateral review. These cases reflect the Supreme Court's recognition that the military is an institution with distinct traditions and disciplinary concerns, and that Congress has given the military justice system a particular role to play in the maintenance of the traditions and discipline essential to the national defense, as balanced against the individual rights of servicemembers. *See* Section II.D.1., *supra*. Particularly where a collateral challenge requires interpretation of the UCMJ, the *Manual for Courts-Martial*, or military law precedents, courts outside the military justice system have endeavored to ensure that an issue has received full and fair consideration by courts within the military justice system before undertaking their own review.

3. *Requirement to bring a coram nobis petition before the court that rendered the judgment*

The likelihood that outside courts will defer taking action on a coram nobis petition pending consideration within the military justice system is increased by the well-recognized principle that a writ of error coram nobis should be brought before the court that rendered the judgment. *See Loving*, 62 M.J. at 251 (citing Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 Va. J. Soc. Pol'y & L. 1, 9 (2003); 2 Steven Childress & Martha Davis, *Federal Standards of Review*, § 13.01, at 13-4 (3d ed.

1999)). This requirement reflects the importance of providing the court that made the decision with the opportunity to consider any subsequent developments and to correct any resulting error in its original judgment. *See, e.g., Lowery v. McCaughtry*, 954 F.2d 422, 422-23 (7th Cir. 1992) (discussing the rationale underlying the principle and noting that "[c]oram nobis arose as a device to extend the period . . . in which the judge who rendered a decision could reexamine his handiwork"). Many courts have disposed of writs of error coram nobis on this basis. *See id.* (noting that counsel in that case "conceded that she had not found even one decision in the history of the United States using coram nobis to set aside a judgment rendered by another court"); *see also United States v. Sawyer*, 239 F.3d 31, 37 (1st Cir. 2001); *Sinclair v. Louisiana*, 679 F.2d 513, 514-15 (5th Cir. 1982); *Mustain v. Pearson*, 592 F.2d 1018, 1021 (8th Cir. 1979); *MacLean*, 2003 U.S. Dist. LEXIS 27219, at *15; *Carter v. Attorney General of the United States*, 782 F.2d 138, 141 (10th Cir. 1986).

In the military justice system, the trial court—the court-martial—does not have independent jurisdiction over a case after the military judge authenticates the record and the convening authority forwards the record after taking action. *See* R.C.M. 1102(d); R.C.M. 1107(f)(2); *United States v. DuBay*, 17 C.M.A. 147, 149, 37 C.M.R. 411, 412 (1967). Because the trial court is not available for collateral review under the UCMJ or the *Manual for Courts-Martial*, collateral review within the military justice system does not occur at the trial court

level. *See United States v. Murphy*, 50 M.J. 4, 5-6 (C.A.A.F. 1998).[2]

In that context, the Courts of Criminal Appeals, the first-level standing courts in the military justice system, provide an appropriate forum for consideration of coram nobis petitions regarding courts-martial. During the initial consideration of a case, such as the case now before us, they engage in de novo consideration of the record and expressly act on the findings and sentence. Article 66(c), UCMJ. With respect to collateral review of the present case, they are well-positioned to determine whether corrective action on the findings and sentence is warranted, including ordering any factfinding proceedings that may be necessary.

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[2] Several Article III courts, citing *Murphy*, have noted the unavailability of collateral review at the trial court as a reason for concluding that court-martial convictions may not be reviewed under 28 U.S.C. § 2255 (providing for collateral review by "the court which imposed the sentence"). *Witham v. United States*, 355 F.3d 501, 505 (6th Cir. 2004); *Gilliam v. Bureau of Prisons*, No. 99-1222, 2000 U.S. App. LEXIS 3684, at *3, 2000 WL268491, at *1 (8th Cir. Mar. 3, 2000) (unpublished); *see Loving*, 62 M.J. at 254-55. In *Witham*, the court considered the case under the general habeas statute, 28 U.S.C. § 2241, and denied relief on the grounds that three of the petitioner's claims had been considered fully and fairly in the military justice system and the remaining two claims were procedurally defaulted. 355 F.3d at 506. In that context, the court did not address exhaustion of other remedies, such as review under the All Writs Act, 28 U.S.C. § 1651(a). In *Gilliam*, the court concluded that the district court had erred in treating a petition under § 2241 as a claim for relief under § 2255. 2000 U.S. App. LEXIS 3684, at *5-*6, 2000 WL 268491, at *2-*3. The court remanded the case to the district court for further proceedings, including consideration of whether the petitioner had exhausted his remedies in the military justice system. 2000 U.S. App. LEXIS 3684, at *7, 2000 WL 268491, at *3.

4. *The sequence of review in the present case*

The Courts of Criminal Appeals have the authority, expertise, and case-specific knowledge appropriate to conduct the initial review of coram nobis petitions, particularly in view of the principle that coram nobis petitions should be brought before the court that rendered the judgment. An Article III court, when asked to consider a court-martial conviction on an issue that has not been fully and fairly reviewed within the military justice system and has not been defaulted procedurally, is likely to defer action pending review by the court that approved the conviction. The sequence of review—collateral review in the military justice system prior to review by the Article III courts—reflects adherence to the concept that the primary responsibility for addressing challenges to courts-martial resides with the courts in the military justice system established by Congress.

Our conclusion—that the Court of Criminal Appeals provides an appropriate forum for coram nobis review—takes into account that the present case does not involve the propriety of jurisdiction to convene a court-martial. The present case involves the jurisdiction to review a case properly referred to a court-martial, unlike, for example, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), which addressed the question of jurisdiction to try a person by court-martial. In *Toth*, the Supreme Court held that a court-martial may not be convened to try a former servicemember who had no relationship with the military at the time of trial. *Id.* at 23. The present case involves a different question: whether a court-martial conviction, imposed on a servicemember while in military status, is subject to collateral review under the All Writs Act by the court that

approved the conviction. When court-martial jurisdiction has been invoked properly at the time of trial, the jurisdiction of the Court of Criminal Appeals to review the case does not depend on whether a person remains in the armed forces at the time of such review. *See United States v. Davis*, 63 M.J. 171, 176-77 (C.A.A.F. 2006) (citing cases). In the present case, the court-martial that convicted Appellant had jurisdiction over both the person and the offense. The Court of Criminal Appeals had jurisdiction to review and approve the findings and sentence on direct review. As such, the Court of Criminal Appeals is an appropriate forum to receive and consider a writ of coram nobis that involves a collateral challenge to the court's approval of the findings and sentence.

The Court of Criminal Appeals did not err by reviewing Appellant's petition under the All Writs Act. We consider next whether Appellant's petition meets the criteria for issuance of a writ of error coram nobis.

III. CORAM NOBIS

A writ of error coram nobis requests the court that imposed the judgment to consider exceptional circumstances, such as new facts or legal developments, that may change the result. *See Loving*, 62 M.J. at 252. Appellant's coram nobis petition asked the Court of Criminal Appeals to take corrective action with respect to the findings and sentence that had been approved by the court on direct review. The decision of the Court of Criminal Appeals on a writ petition is subject to appellate review. *See, e.g., Dettinger v. United States*, 7 M.J. 216, 222-24 (C.M.A. 1979); C.A.A.F. R. 4.(b)(2); R.C.M. 1204(a) Discussion.

Subsection A discusses the limitations on issuance of a coram nobis writ. Subsection B addresses the application of the threshold limitations to the circumstances of the present appeal. Subsection C considers whether a writ of error coram nobis is necessary or appropriate with respect to Appellant's claim that he was denied his constitutional right to the effective assistance of counsel.

A. LIMITATIONS ON THE AVAILABILITY OF CORAM NOBIS

The Supreme Court, in *Morgan*, 346 U.S. at 511, observed that coram nobis permits "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review," but only under very limited circumstances. Although a petition may be filed at any time without limitation, a petitioner must meet stringent threshold requirements: (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist. *See id.* at 512-13; *Loving*, 62 M.J. at 252-53; 28 James Wm. Moore et al., *Moore's Federal Practice* § 672.02[2][c], at 672-43-46 (3d ed. 2007); 3 Charles Alan Wright et al., *Federal Practice and Procedure: Criminal* § 592 (3d ed. 2004); 6 Wayne R. LaFave et al., *Criminal Procedure* § 28.9(a), at 121-22 (2d ed. 2004).

This Court has not previously identified the standards applicable to review of an ineffective assistance of counsel claim raised via a coram nobis petition. At a minimum, such standards must ensure that relief is limited to circumstances in which the requested writ is "necessary or appropriate" within the meaning of the All Writs Act." *Loving v. United States*, 64 M.J. 132, 145 (C.A.A.F. 2006). To implement that admonition, we adopt the two-tiered evaluation used by Article III courts for coram nobis review of ineffective assistance of counsel claims. In the first tier, the petitioner must satisfy the threshold requirements for a writ of coram nobis, as described above. If the petitioner does so, the court then analyzes, in the second tier, the ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). *See, e.g., United States v. Bejacmar*, 217 F. App'x 919, 922-23 (11th Cir. 2007) (petitioner did not satisfy coram nobis threshold requirements because he failed to explain why he did not include his ineffective of counsel claim in his prior request for habeas relief); *Evola v. Attorney General of the United States*, 190 F. App'x 171, 174-76 (3d Cir. 2006) (assuming petitioner met coram nobis threshold requirements, the claim failed to demonstrate prejudice under *Strickland*); *United States v. Kwan*, 407 F.3d 1005, 1017-18 (9th Cir. 2005) (petitioner satisfied coram nobis threshold requirements and demonstrated that counsel's erroneous advice on immigration consequences of guilty plea was both deficient and prejudicial); *United States v. Castro*, 26 F.3d 557, 559-63 (5th Cir. 1994) (petitioner satisfied coram nobis threshold requirements and his claim that counsel failed to inform him, prior to guilty plea, of opportunity to request a judicial recommendation against deportation remanded to district court for

determination of whether it constituted ineffective assistance of counsel). Because the claim arises under the All Writs Act, the petitioner must establish a clear and indisputable right to the requested relief. *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004).

B. APPLICATION OF THE CORAM NOBIS THRESHOLD CRITERIA

Appellant's writ petition meets the threshold criteria for coram nobis review. First, the alleged error, denial of the Sixth Amendment right to the effective assistance of counsel, is of the most fundamental character. *See, e.g., Kwan*, 407 F.3d at 1018; *Castro*, 26 F.3d at 559; *cf. Morgan*, 346 U.S. at 512-13 (coram nobis appropriate to remedy denial of Sixth Amendment right to the assistance of counsel).

Second, there is no other adequate remedy, other than consideration of coram nobis by the Navy-Marine Corps Court of Criminal Appeals, to rectify the consequences of the alleged error. Appellant is not in custody, so he cannot obtain relief through a writ of habeas corpus. *Morgan*, 346 U.S. at 510 (rejecting the contention that the federal habeas corpus statute should be construed "to cover the entire field of remedies in the nature of *coram nobis*").

The pending deportation hearings do not provide Appellant with an adequate remedy. The proper forum for post-conviction review of a court-martial proceeding is a collateral review proceeding, *see* Section II.A., *supra*, not an administrative proceeding in which the proposed agency action is a collateral consequence of the conviction. In an administrative forum addressing the collateral consequences of a conviction, such as deporta-

tion, the hearing officer and any subsequent reviewing court would be obligated to give res judicata effect to the court-martial conviction. *See* Section II.C., *supra*. Because Appellant's claim did not receive full and fair consideration within the military justice system on direct review, an outside court is unlikely to review his writ petition prior to such consideration by the Court of Criminal Appeals, the first-level standing court that approved the findings and sentence at issue, as discussed *supra* in Section II.D.

Third, valid reasons exist for not seeking relief earlier. Appellant's claim is that his counsel misinformed him as to the immigration consequences of his guilty plea and that avoiding deportation was the primary motivation for his guilty plea. His conviction became final when it was affirmed by the Court of Criminal Appeals on February 24, 2000, because Appellant did not seek further review. However, the immigration consequences did not become known to him until the Government initiated deportation proceedings in 2006 and Appellant sought coram nobis relief at the lower court within a few months of being notified of those proceedings.

Fourth, the new information (the immigration consequences) could not have been discovered through the exercise of reasonable diligence prior to the original judgment. Appellant retained civilian counsel to represent his interests in the court-martial proceedings. Assuming, for purposes of the threshold inquiry that his unrebutted allegations are true, he exercised reasonable diligence by retaining counsel, calling counsel's attention to his concern about immigration consequences, and relying on counsel's advice assuring him that he would

not be deported on the basis of a special court-martial conviction.

Fifth, the writ does not seek to reevaluate previously considered evidence or legal issues. The appellate proceedings on direct review did not consider whether Appellant's plea was compromised by misleading advice from counsel.

Sixth, the sentence has been served, but serious consequences persist. The Government, through USCIS, has initiated deportation proceedings that rely primarily on Appellant's court-martial conviction as the basis for deportation.

The threshold criteria establish eligibility for review, not the propriety of the requested writ. We consider next whether the court below erred in denying relief with respect to Appellant's ineffective assistance of counsel claim

C. INEFFECTIVE ASSISTANCE OF COUNSEL

1. *Applicable standards*

A military accused is entitled under the Constitution and Article 27(b), UCMJ, 10 U.S.C. § 827(b) (2000), to the effective assistance of counsel. *United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987) (citing *Strickland*, 466 U.S. 668). An accused making a claim of ineffective assistance "must surmount a very high hurdle." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (citation and quotation marks omitted). Courts reviewing such a claim "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The presumption of competence will not be overcome unless the accused demonstrates: first, a defi-

ciency that is "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment"; and second, that the accused was prejudiced by errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 687) (quotation marks omitted). When challenging the effectiveness of counsel in a guilty plea case, the accused must also "show specifically that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

The burden of establishing the truth of factual matters relevant to the claim of ineffective assistance rests with the accused. *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). If there is a factual dispute on a matter pertinent to the claim, the determination as to whether further factfinding will be ordered is resolved under *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

2. *Appellant's Claim of Ineffective Assistance of Counsel*

Appellant's Sixth Amendment claim focuses on the advice he received from counsel prior to trial regarding the deportation consequences of a guilty plea. The declaration accompanying Appellant's coram nobis petition states that: (1) he retained Mr. C as civilian counsel to represent him at his court-martial in 1998; (2) he told Mr. C that he was a permanent resident alien who had been living in the United States for fourteen years, that he intended to remain indefinitely, that his primary con-

cern was to avoid the risk of deportation, and that he was more concerned about deportation and separation from his family than the risk of going to jail; (3) Mr. C advised Appellant that if he contested the charges, he would likely face a general court-martial, and that an acquittal would avoid deportation consequences; but a conviction at a general court-martial would constitute a felony that could be used as a basis for deportation; (4) Mr. C further advised him that a special court-martial would constitute a misdemeanor and could not be used as a basis for deportation; (5) Appellant entered into a pretrial agreement that provided for referral of charges to a special court-martial; and (6) Mr. C advised him of the specific words that he would have to use in the plea colloquy to ensure that the military judge did not reject the plea.

With respect to Appellant's plea, we note that there are specialized requirements for a guilty plea in the military justice system. *See* Article 45, UCMJ. The military judge must engage in a specific dialogue with the accused, in which the accused addresses the voluntariness of the plea, describes the factual basis for guilt, and demonstrates an understanding of any pretrial agreement. R.C.M. 910(d)-(f). The record reflects that Appellant had considerable difficulty in acknowledging guilt during the military judge's plea inquiry. The inquiry in Appellant's case extended over a two-day period before the military judge finally accepted the plea.

Appellant was convicted, served his time in confinement, and returned to civilian life. On two occasions, he applied to the Immigration and Naturalization Service for naturalization. On both occasions, his application was rejected, citing his court-martial conviction. Each

time, however, he was informed that the rejection was based on conduct within the five-year period prior to his application and was "without prejudice" to a future application. In neither instance did the Government suggest that he would face deportation.

In late 2006, however, six years after his conviction was affirmed on direct appeal, the Government initiated deportation proceedings against him. The deportation charges filed on October 30, 2006 and April 12, 2007 are based on his 1998 conviction by special court-martial.

Appellant's declaration states that Mr. C's advice regarding deportation consequences was the "decisive factor" in his decision to plead guilty, and that he would have insisted on going to trial had he been advised that a guilty plea could have resulted in deportation. Appellant contends that the deportation proceedings demonstrate that his counsel was ineffective because the very consequence that counsel assured him could be avoided by a guilty plea at a special court-martial is now being pursued by the Government.

An attorney's failure to advise an accused of potential deportation consequences of a guilty plea does not constitute deficient performance under *Strickland*. See, *e.g.*, *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003). An affirmative misrepresentation about such consequences, however, can constitute deficient performance, particularly when the client requests the information and identifies the issue as a significant factor in deciding how to plead. *See, e.g.*, *Kwan*, 407 F.3d at 1015-16; *United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002); *Qiao v. United States*, No. 07 Civ. 3727 (SHS), 98 Cr. 1484 (SHS), 2007 U.S. Dist. LEXIS 87934, at *8, 2007 WL 4105813, at *3 (S.D.N.Y. Nov. 15, 2007); *United*

States v. Khalaf, 116 F. Supp. 2d 210, 217 (D. Mass. 1999); *United States v. Mora-Gomez*, 875 F. Supp. 1208, 1213 (E.D. Va. 1995). *But see Commonwealth v. Padilla*, No. 2006-SC-000321-DG, 2008 Ky LEXIS 3, at *7, 2008 WL 199818, at *3 (Ky. Jan. 24, 2008). Although occurring in a different context, the Supreme Court has noted the importance of immigration consequences to a defendant who is considering whether to plead guilty. *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001), *superseded by statute on other grounds*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

To show prejudice from ineffective assistance of counsel in a guilty plea case, an accused must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *Alves*, 53 M.J. at 289. The focus is not on the outcome of a potential trial, but on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59; *cf. id.* at 60 (finding no prejudice where petitioner neither alleged that he would not have pleaded guilty absent counsel's erroneous advice, nor any special circumstances "that might support the conclusion that he placed particular emphasis" on the subject of the erroneous advice).

Appellant, noting that the Government has not rebutted his declaration, asserts that we should treat the matters stated therein as accurate and decide the legal issue of whether his counsel was ineffective. *See Ginn*, 47 M.J. 236. In the current posture of the case, we decline to do so. The case before us is a writ appeal of a decision from the Court of Criminal Appeals, not an original writ petition. At the Court of Criminal Appeals, the Govern-

ment filed a motion to dismiss and reserved the right to file an answer addressing the substance of the petition if ordered to do so by the court. The court below denied the Government's motion to dismiss, but also summarily denied Appellant's petition on the merits without ordering a Government response. As a result, the Government did not have the opportunity before the Court of Criminal Appeals to obtain affidavits from the counsel who represented Appellant at trial and to submit such other matter as might have a bearing on the merits of Appellant's claim.

The court below should not have dismissed Appellant's petition without obtaining and assessing such information. The matter set forth in Appellant's declaration, if true, warranted consideration under *Strickland*, particularly in light of other aspects of the trial and appellate record, including the nature of the providence inquiry, Appellant's apparent belief that he could apply for naturalization without facing deportation consequences, and the subsequent deportation proceedings. Until the Government is required to respond on the merits, however, it would be inappropriate to render a judgment on the merits of his petition. At this stage, Appellant's petition facially establishes a sufficient basis for coram nobis review, but a ruling on his petition would be premature without a Government response, consideration by the Court of Criminal Appeals as to whether counsel's performance was deficient and, if so, whether Appellant was prejudiced thereby. *See United States v. Castro*, 26 F.3d at 563; *Downs-Morgan v. United States*, 765 F.2d 1534, 1541-42 (11th Cir. 1985). In that regard, we note that the high hurdles established in *Strickland* and *Hill*, both of which involved collateral review, establish the appropriate standards for assess-

ing the Sixth Amendment claim in the present case, both in terms of allegations of deficiency and prejudice. *See Khalaf*, 116 F. Supp. 2d at 216 and cases cited therein.

IV. DECISION

Accordingly, we remand Appellant's petition to the United States Navy-Marine Corps Court of Criminal Appeals for further proceedings, where the Government will have the opportunity to obtain affidavits from defense counsel and submit such other matter as the court deems pertinent. The Court of Criminal Appeals will then determine whether the merits of Appellant's petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required under *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). The court will determine whether Appellant's counsel rendered deficient performance and, if so, whether such deficiency prejudiced Appellant under *Strickland v. Washington*, 466 U.S. 668 (1984). If prejudice is found, the court shall determine whether the requested relief should be granted.

STUCKY, Judge (dissenting):

I find myself in agreement with many of the points made by Judge Ryan in her able and scholarly dissenting opinion. I consider it established that we have coram nobis jurisdiction in cases in which the jurisdiction of the court-martial is at issue. The extent of our jurisdiction beyond this very limited area is questionable. However, even assuming that we have such jurisdiction, this is not a proper case for coram nobis relief. I would, therefore, deny the petition and do not find it necessary now to determine the extent, if any, of our jurisdiction beyond the circumscribed area set out above. *See, e.g.*,

United States v. Tavares, 10 C.M.A. 282, 283, 27 C.M.R. 356, 357 (1959) (assuming without deciding that Court had jurisdiction, "this case presents no grounds for invoking such extraordinary relief").

The majority opinion cites *United States v. Frischholz*, 16 C.M.A. 150, 36 C.M.R. 306 (1966), as authority for exercising jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a) (2000) after Appellant's conviction became final under Article 76, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 876. *Denedo v. United States*, __ M.J. __ (18) (C.A.A.F. 2008). In *Frischholz*, the government argued that the All Writs Act was intended to apply only to Article III courts and at least implied that our location "for administrative purposes" in the Department of Defense made us something other than a "court" for the purposes of the Act. *Id.* at 308 n.1. This Court properly rejected those arguments, holding that the Act's application to "courts established by Act of Congress" was not limited to courts established by Act of Congress pursuant to Article III of the Constitution. *Id.* at 307-08. However, it is one thing to state that this Court has authority to issue writs under the All Writs Act and quite another to conclude that that authority includes a general mandate to correct errors in cases that are final by means of coram nobis. It is established that a writ issued under the Act must be in aid of this Court's existing jurisdiction and may not be a vehicle for expanding it. *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Font v. Seaman*, 20 C.M.A. 387, 390, 43 C.M.R. 227, 230 (1971); *United States v. Snyder*, 18 C.M.A. 480, 482-83, 40 C.M.R. 192, 194-95 (1969).

In *Del Prado v. United States*, 23 C.M.A. 133, 48 C.M.R. 749 (1974), and *Gallagher v. United States*, 22

C.M.A. 191, 46 C.M.R. 191, (1973), we granted relief in cases in which direct review was no longer available or had been completed. However, both of these cases involved fundamental and inherent problems of jurisdiction. In *Del Prado*, the accused was tried by a military judge alone although he had not requested in writing that he be so tried, *Del Prado*, 23 C.M.A. at 133, 48 C.M.R. at 749, while in *Gallagher*, enlisted members sat on the accused's court-martial although he had not personally submitted a written request for enlisted representation.[1] *Gallagher*, 22 C.M.A. at 192, 46 C.M.R. at 192. Of course, a federal court always has jurisdiction to determine its own jurisdiction. *United States v. United Mine Workers of America*, 330 U.S. 258, 292 n.57 (1947); *Mansfield, Coldwater & Lake Michigan Railway Company v. Swan*, 111 U.S. 379, 382 (1884). The expansive statements as to jurisdiction in *Del Prado* and *Gallagher*, particularly the assertion in Gallagher that the filing of a petition alone vests jurisdiction in this Court, 22 C.M.A. at 193, 46 C.M.R. at 193, must be read in that context. Neither *Del Prado* nor *Gallagher* is authority for a general superintendency over cases in which Article 67, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867 (2000), jurisdiction is otherwise absent. *Goldsmith*, 526 U.S. at 536.[2]

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[1] See *United States v. Dean*, 20 C.M.A. 212, 215, 43 C.M.R. 52, 55(1970), and *United States v. White*, 21 C.M.A. 583, 584, 588-89,45 C.M.R. 357, 358, 362-63 (1972), for the jurisdictional nature of those errors.

[2] In *Garrett v. Lowe*, 39 M.J. 293 (C.M.A. 1994), we granted relief in a case in which fundamental jurisdiction was not at issue, based upon an instructional error. However, this case is distinguishable because, although Appellant styled his request for relief as one for coram nobis, he was still in confinement at the time and therefore habeas corpus was

While I consider our authority to grant the requested relief questionable, I need not reach that issue here, because Appellant has not made out a case for relief on the merits. This is not a case in which there existed any fundamental jurisdictional impediment to Appellant's original trial by court-martial, and indeed none is alleged. Rather, what we have here is a case, like many others, in which the complaint is ineffective assistance of counsel. Moreover, the claim of ineffective assistance relates not to the conduct, findings, or sentence of the court-martial, but purely to a collateral consequence thereof.

Appellant asserts that his primary concern in his court-martial was avoiding deportation; that he was erroneously advised by his civilian counsel that a conviction by a special court-martial would not subject him to deportation, but a conviction by a general court-martial would; that he was advised that the Government would take the case to a general court-martial unless he pled guilty; that, in reliance upon this advice, he pled guilty before a special court-martial; that eight years later, the Department of Homeland Security initiated deportation proceedings against him on the basis of the conviction; and that, had he known of the possibility of deportation, he would have pled not guilty and taken his chances with the general court-martial.

Assuming, without deciding, that Appellant's counsel incorrectly advised him as to the state of the law, this alone does not entitle him to coram nobis relief. Deportation is not only a collateral consequence of a court-

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available. *Id.* at 295. We granted sentence relief without stating which prerogative writ was the basis of the action. *Id.* at 297.

martial conviction, but a consequence entirely outside the purview of the armed forces and the system of military justice. As a general rule, this Court has concerned itself with the collateral consequences of court-martial convictions only in very limited circumstances. *United States v. Miller*, 63 M.J. 452, 457 (C.M.A. 2006) (sex offender registration); *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001) (retirement benefits); *United States v. Hall*, 46 M.J. 145, 146 (C.A.A.F. 1997) (dependent benefits); *United States v. McElroy*, 40 M.J. 368, 371-72 (C.M.A. 1994) (veterans' benefits); *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) (retirement benefits); *United States v. Bedania*, 12 M.J. 373, 374-75 (C.M.A. 1982) (administrative separation resulting from guilty plea). In *Miller*, we established a prospective prophylactive rule that, while not per se ineffective assistance, defense counsel's failure to advise the accused of possible sex offender requirements for offenses to which he is pleading guilty will be "one circumstance this Court will carefully consider in evaluating allegations of ineffective assistance of counsel." *Miller*, 63 M.J. at 459. In *Boyd*, we established a prospective rule requiring military judges to instruct on the effect of a punitive discharge on retirement benefits, if requested by the defense and supported by the evidence. *Boyd*, 55 M.J. at 221.

Coram nobis is an "extraordinary remedy" limited to "errors of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States v. Morgan*, 346 U.S. 502, 509 n.15 (1954) (quotation marks and citation omitted); *United States v. Mayer*, 235 U.S. 55, 69 (1914). In *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987), the Court of Appeals for the Ninth Circuit set out four crite-

ria for the issuance of the writ: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) sufficient adverse consequences exist to satisfy the case or controversy requirement; and (4) the error is of the most fundamental character.

The third criterion applies to the Article III courts, not to a court of purely statutory jurisdiction like this one. The second criterion admittedly favors Appellant, since the deportation proceedings were instituted years after the court-martial. However, neither the first nor the last supports the requested relief.

With regard to the first criterion, the lack of a more usual remedy, Appellant has not yet been deported. As a lawful permanent resident, he has a statutory right to notice and a hearing before an immigration judge, as well as appellate rights both within the executive branch and to the Article III courts. Indeed, it appears that Appellant's counsel intends to argue that his special court-martial conviction does not constitute an "aggravated felony" within the meaning of the immigration laws—the very question that is the gravamen of this ineffective assistance of counsel claim. Writ-Appeal Petition at 18, n.11, *Denedo v. United States*, No. 07-8012 (C.A.A.F. Mar. 30, 2007).[3] In any event, the availability of meaningful *direct* review of his immigration proceeding, in the venue and according to the procedures set out by Congress for such matters, significantly undercuts any argument for extraordinary relief in the military justice system.

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[3] If Appellant's conviction is not an "aggravated felony," then it would appear that the advice given by his counsel at the court-martial was legally correct.

The fourth *Hirabayashi* criterion, that the error be of "the most fundamental character," is not met either. There was no jurisdictional defect in Appellant's court-martial; his sole complaint is the alleged ineffective assistance of counsel which admittedly did not manifest itself until years after the court-martial, when the deportation proceeding was instituted. Generally, failure to advise a client in a criminal trial of the potential adverse immigration effects, including deportation, of a guilty plea or conviction has not been held to constitute ineffective assistance of counsel. This is because deportation, or other immigration consequences, are collateral to the criminal conviction and are thus not covered by the Sixth Amendment in the criminal context. *See, e.g.*, *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992); *Santos v. Kolb*, 880 F.2d 941, 944-45 (7th Cir. 1989), *superseded by statute on other grounds*, Immigration Act of 1990, Pub. L. No. 101-649, § 505(b), 104 Stat. 5050 (1990), *as recognized in Rodriguez v. United States*, No. 92-3163, 1995 U.S. App. LEXIS 7920, at *3, 1995 WL 156669, at *1 (7th Cir. Apr. 6, 1995); *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988); *United States v. Gavilan*, 761 F.2d 226, 228-29 (5th Cir. 1985). The 1996 amendments to the Immigration and Nationality Act relating to "aggravated felonies" did not change the collateral nature of immigration proceedings. *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002); *United States v. Armador-Leal*, 276 F.3d 511, 513 (9th Cir. 2002); *United States v. Gonzalez*, 202 F.3d 20, 26-27 (1st Cir. 2000).

Appellant, relying on *United States v. Kwan*, 407 F.3d 1005, 1015 (9th Cir. 2005) and *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002), attempts to draw

a distinction between *failure* to advise as to the potential immigration consequences of a conviction and *incorrect* advice on the subject. But a defendant in a criminal trial who alleges ineffective assistance of counsel must show more than incorrect advice; he must show prejudice. To meet this standard, he must show that, absent the errors, the outcome of the trial would have been different, and that the result of the trial was fundamentally unfair or unreliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *accord Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). Here, all we are presented with is the bald assertion that, had the advice been correct, Appellant would not have pled guilty, but would have taken his chances before a general court-martial, where a conviction would have exposed him to a considerably harsher sentence and, in any event, still would have subjected him to deportation. This is insufficient. *Parry v. Rosemeyer*, 64 F.3d 110, 118 (3d Cir. 1995); *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994); *Key v. United States*, 806 F.2d 133, 139 (7th Cir. 1986); *see also State v. Sabillon*, 622 S.E.2d 846, 848-49 (2005). It is questionable whether Appellant has even made out a case for prejudice under applicable ineffective assistance of counsel law; in any event, he has not met the far higher standard—error "of the most fundamental character"—necessary for coram nobis relief.[4]

I respectfully dissent.

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[4] Whether any nonjurisdictional error can meet the "fundamental character" standard is a question that need not be reached in this case. I am satisfied that on these facts, Appellant has not met that standard.

RYAN, Judge (dissenting):

"Courts created by statute can have no jurisdiction but such as the statute confers." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (quoting *Sheldon v. Sill*, 49 U.S. 441, 449 (1850)). There is no statutory basis for jurisdiction in this Court in this case: The petitioner is a civilian, lawfully discharged from military service pursuant to a court-martial conviction. And the case has been final, for purposes of both Articles 71 and 76, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 871, 876 (2005), for seven years. Indeed, the statutory limits of this Court's jurisdiction are precisely to the contrary. *See* Articles 2, 3, 66, 67, 73, and 76, UCMJ, 10 U.S.C. §§ 802, 803, 866, 867, 873, 876 (2005).

Although we have no jurisdiction over Denedo and final cases fall outside our statutory mandate, the majority nonetheless concludes today that this Court has jurisdiction. This is perplexing. In addition to being contrary to the statutory scheme, this Court's assertion of jurisdiction flies in the face of Supreme Court precedent, the decisions of at least two federal circuit courts of appeal, and the position, for the past fifty-seven years, of the solicitors general of the United States as agents of the President, commander in chief of the armed forces. *See Solorio v. United States*, 483 U.S. 435, 439-40 (1987) (recognizing that military jurisdiction is tied to military status, i.e., U.S. Const. art. I, § 8, cl. 14—a person within the "land and naval Forces"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14-15 (1955) (holding that Article I military jurisdiction could not be "extended to civilian ex-soldiers who had severed all relationship with the military and its institutions");

Gusik v. Schilder, 340 U.S. 128, 132 (1950) (interpreting the predecessor to Article 76—Article 53 of the Articles of War, 62 Stat. 639, 10 U.S.C. § 1525 (1950)—and concluding that finality "describe[es] the terminal point for proceedings within the court-martial system"); *see also Witham v. United States*, 355 F.3d 501, 505 (6th Cir. 2004) (stating that "neither the Uniform Code of Military Justice nor the Manual for Courts-Martial provides for collateral review within the military courts"); *Gilliam v. Bureau of Prisons*, No. 99-1222, 2000 U.S. App. LEXIS 3684, at *4, 2000 WL 2684919, at *2, (8th Cir. Mar. 10, 2000) ("Unlike the practice in the United States Circuit Courts of Appeal and District Courts, neither the UCMJ . . . nor the Manual for Courts-Martial . . . provides procedures for collateral, post-conviction attacks on guilty verdicts.") (quoting *United States v. Murphy*, 50 M.J. 4, 5 (C.A.A.F. 1998) (quotation marks omitted)); Brief for Petitioners on the Jurisdictional Issues at 7, *Schlesinger v. Councilman*, 420 U.S. 738 (1975) (No. 73-662) (stating that the legislative history of Article 76, UCMJ shows that Article III court collateral review was expected to be "the sole exception to the finality of actions within the military court system"); Brief for Respondent at 3-4, *Gusik*, 340 U.S. 128 (No. 110) (stating that the exception to finality for a motion for new trial in the Articles of War provided the sole collateral remedy within the courts-martial system). I agree with the Supreme Court, the Sixth and Eighth Circuits, the solicitors general, and the Government's position in this case: we have no jurisdiction over a discharged civilian's case that is final under Article 76, UCMJ.

The majority conclusorily asserts that it has jurisdiction, grounded in the fact that Denedo was once in the

military, and his case once fell within the statutory jurisdiction of the military justice system. *See Denedo v. United States*, __ M.J. __ (10) (C.A.A.F. 2008) ("The existing statutory jurisdiction of the Navy-Marine Corps Court of Criminal Appeals includes cases such as Appellant's, in which the sentence extends to a punitive discharge."). It does not explain how jurisdiction follows in this case. As the Supreme Court reminded this Court not so very long ago, we are "not given authority, by the All Writs Act [28 U.S.C. § 1651(a) (2000)] or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments [we have] affirmed." *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999).

It is unclear to me why the Court charts this course today. Denedo's claim—ineffective assistance of counsel, based on newly discovered evidence, after his case is final under Article 76, UCMJ—would be cognizable immediately in federal court but for this Court's refusal to state that it lacks jurisdiction. *Massaro v. United States*, 538 U.S. 500, 504 (2003) (stating that ineffective assistance may be raised on collateral review irrespective of whether petition could have raised it on direct appeal); *Dobbs v. Zant*, 506 U.S. 357, 358-60 (1993) (holding that courts should consider newly discovered evidence regarding ineffective assistance of counsel on collateral review). I do not question that the military justice system can fairly assess Denedo's claim. But the majority's suggestion that the military system is somehow better able to assess his claim in this case, a fact-bound question involving a civilian and a civilian attorney and grounded in part in assessment of immigration law, is unfounded.

I. *Absent Jurisdiction No Writ May Issue*

The Court provides relief today by remanding the case for additional action by the Court of Criminal Appeals (CCA), in reliance on the All Writs Act. But in the absence of jurisdiction, a writ may not issue. *Marbury v. Madison*, 5 U.S. 137, 173 (1803). Most recently the Supreme Court reaffirmed this longstanding principle as it relates to the jurisdiction of this Court, stating that, "the express terms of the [All Writs] Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Goldsmith*, 526 U.S. at 534-35. The All Writs Act is a mechanism for exercising power a court already has. The starting point of the analysis must always be whether a court has jurisdiction before proceeding to the question whether a writ should issue. *See* 28 U.S.C. § 1651(a) (2000).

This Court, as a legislatively created Article I court, is a court of limited jurisdiction. Our limited powers are defined entirely by statute. *See generally* Articles 2-3, 66-76, UCMJ, 10 U.S.C. §§ 802-03, 866-76 (2005). Despite the majority's holding to the contrary, under those Articles no jurisdiction exists in this case.

A. This Court Does Not Have Jurisdiction Over Discharged Civilians Who Have Severed Their Connection With the Military

Article I, § 8, cl. 14 of the U.S. Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." Articles 2 and 3, UCMJ, reflect the considered judgment of Congress as to those classes of persons who fall within that constitutional grant. Article 2, UCMJ, delineates jurisdiction

over "[p]ersons subject to this chapter." Persons discharged from the armed forces, other than retired members under Article 2(a)(4) and (5), UCMJ, or persons in custody of the armed forces serving a sentence imposed by court-martial under Article 2(a)(7), UCMJ, are not included within Article 2, UCMJ. Article 3, UCMJ, entitled "[j]urisdiction to try certain personnel," sets forth, *inter alia*, the limited circumstance in which a discharged servicemember is not relieved from military jurisdiction: a person charged with fraudulently obtaining his discharge or who has deserted.[1] Article 3(b) and (c), UCMJ. Articles 2 and 3, UCMJ, are consonant with the considered view that the military justice system does not have jurisdiction over civilians, and that there is a military community, a civilian community, and "no third class which is part civil and part military." William Winthrop, *Military Law and Precedents* 106 (2d. ed. 1920).

The Supreme Court has not hesitated to invalidate any efforts by Congress or the military to sweep civilians unattached to a military unit within the jurisdiction of the military justice system. *See, e.g., McElroy v. United States ex rel Guagliardo*, 361 U.S. 281, 284-87 (1960) (holding that a provision of the UCMJ extending jurisdiction to persons accompanying the armed forces outside the continental limits of the United States could not be constitutionally applied to civilian employees in time of peace); *Reid v. Covert*, 354 U.S. 1, 30-35 (1957) (invalidating the same provision as applied to civilian dependents of members of the armed forces in time of peace); *Toth*, 350 U.S. at 14 (recognizing that Article I military jurisdiction could not be "extended to civilian

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[1] Article 3(a), UCMJ, relates to persons currently in a status covered by Article 2, UCMJ.

ex-soldiers who had severed all relationship with the military and its institutions"). I fear that today the majority invites the Supreme Court to issue another decision reaffirming the holdings of this line of cases.

B. Denedo is a Civilian Who Has Severed All Relationship With the Military

Denedo is a *former* servicemember lawfully discharged from military service pursuant to a court-martial conviction. He has no current relationship with the military—at least no more of a relationship than any other civilian who was formerly in the military might have if he had filed a writ of coram nobis here—which is to say, no legally cognizable relationship with the military justice system under the UCMJ.

The majority acknowledges that Denedo was discharged from the Navy on May 30, 2000. On that day, the bad-conduct discharge adjudged at his court martial and approved by the convening authority was effective, and Denedo was a civilian, completely detached from the military and the military justice system. And, as stated above, Article 2, UCMJ does not provide jurisdiction over military personnel who have been discharged from the military service and have no remaining connection to the military. *Toth*, 350 U.S. at 14 ("[i]t has never been intimated by [the Supreme] Court . . . that Article 1 military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions"). It is contrary to the limited nature of a legislatively created Article I court to exercise jurisdiction over a person not specifically prescribed by statute. The majority opinion fails to explain how we have jurisdiction over Denedo, given his discharge.

C. Collateral Review is Outside Article 67, UCMJ

Article 67, UCMJ, provides jurisdiction for this Court to "review the record" in specified cases reviewed by the CCA. The fact that Denedo's case was such a case is a truism that provides no legal authority or logical support for collateral review now that his case is final. The majority's reasoning from true premises to unrelated conclusions without statutory or other authority is unsound.

Moreover, it is not at all clear how Article 66 or 67, UCMJ, supports an assertion of jurisdiction to conduct collateral review. The CCAs have jurisdiction to act on "the findings and sentence as approved by the convening authority." Article 66(c), UCMJ. In undertaking this review, a CCA may only affirm such parts of the findings and sentence "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Id.* While reasonable minds may differ as to what is included in "the record," matters that have not been reviewed by the convening authority are not part of the record of trial, and therefore are unreviewable by the CCA or this Court. *See United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (discussing what constitutes the "entire record" for purposes of Article 66(c), UCMJ, review).

Articles 66 and 67, UCMJ are statutes governing direct review of courts-martial[2] because the jurisdic-

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[2] This does not rule out jurisdiction in the limited exception recognized by the Supreme Court in *Goldsmith*, 526 U.S. at 536 to "compel adherence to its own judgment." *See also United States v. United States District Court*, 334 U.S. 258, 263-64 (1948) (discussing the power of federal courts of appeals to issue mandamus). And, as always, a court may question whether its initial judgment was void in the first

tional grants under Articles 66 and 67, UCMJ are tied to "the record." *See Beatty*, 64 M.J. at 458. It is not surprising that collateral review is not provided for within those statutes. Collateral review most often requires, by its terms, development and consideration of something outside "the record." *See Parke v. Raley*, 506 U.S. 20, 30 (1992) (citing *Black's Law Dictionary* 261 (6th ed. 1990)); *see also* John McKee VanFleet, *The Law of Collateral Attack on Judicial Proceedings* 5-6 (1892) (defining a collateral attack).

In those instances where cases on direct review require additional fact finding, we have an unwieldy and imperfect system in place to facilitate inclusion of those facts in the record: new factual matters must be developed at a court-martial, revisited by the convening authority, and "included" in the record for review.[3] *United States v. DuBay*, 17 C.M.A. 147, 149; 37 C.M.R. 411, 413 (1967). Additional awkward constructs were created to determine the threshold question whether additional facts were needed. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). But the fact that these procedures may apply on direct review is not relevant to whether this Court has the power to employ them on collateral review. Moreover, it is untenable to suggest that jurisdiction for collateral review of final cases is *clear* under Articles 66 and 67, UCMJ, in instances where collateral

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instance for want of jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. United Mine Workers*, 330 U.S. 258, 291(1947)).

[3] The permutations and legal gymnastics necessary to bring cases on direct review within our statutory grant in the limited circumstances where new facts must be brought within "the record" are challenging enough for any justice system.

review of the issue necessarily requires the development of facts outside the statutory grant. And this Court has no mechanism for doing so. *See United States v. Walters*, 45 M.J. 165, 167 (C.A.A.F. 1996) (Cox, C.J., and Sentelle, J., United States Court of Appeals for the District of Columbia, sitting by designation, concurring in the result) (urging "the Joint-Service Committee on Military Justice to consider and recommend to the President a procedure by which collateral attacks on courts-martial might be litigated").[4] There is no mention of, and thus no provision for, post-finality collateral review anywhere within Article 66 or 67, UCMJ.

D. Denedo Seeks Collateral Review

In this case Denedo filed a writ coram nobis at the CCA seeking to challenge his court-martial conviction on the grounds that his Sixth Amendment right to counsel was violated because his counsel was ineffective. Denedo alleges that his civilian counsel told him that if he pled guilty he would not be deported. He alleges that he recently discovered that this was not true. Obviously, this privileged conversation was not included in the record of trial. For Denedo to have any hope of prevailing, evidence extrinsic to the record must be developed. *See Massaro*, 538 U.S. at 505 (stating the advantages of collateral review in developing the factual predicate for an ineffective assistance of counsel claim); *see also DuBay*,

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[4] Chief Judge Cox's observation is relevant to this case. I note that military counsel has entered an appearance before this Court on behalf of Denedo. I question whether, under the reasoning of the majority opinion, Article 70(a) and (c), UCMJ, would require that Denedo, and all other similarly situated litigants whose cases are final, be afforded military counsel as their cases proceed.

17 C.M.A. at 149, 37 C.M.R. at 413. As the case is final, and no convening authority or court-martial has jurisdiction over a discharged servicemember, we have no mechanism for developing these extrinsic facts.[5]

II. *The Effect of Finality Under Article 76, UCMJ*

In addition to lacking statutory jurisdiction over a civilian's writ seeking collateral review of a court-martial, today the Court acts on a case that has been "final" for seven years.

Denedo's bad-conduct discharge was capable of execution on May 30, 2000, because appellate review was completed and the findings and sentence were approved, reviewed, and affirmed as required by the UCMJ. Execution of the bad-conduct discharge returned Denedo to civilian status. Completion of appellate review also meant his case was "final" for purposes of Article 76, UCMJ. *See* Rule for Courts-Martial (R.C.M.) 1209. As expressed in Article 76, UCMJ, this means the same proceedings, findings, and sentence Denedo complains of here are "final and conclusive" within the court-martial system, subject to specific exceptions.

Article 76, UCMJ, states that:

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or

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[5] Even if the CCA or this Court acts on Denedo's claims of ineffective assistance of counsel, it is unclear how that necessarily grants the relief he truly requests. He wishes to stop the deportation proceedings that stem from his conviction. But neither this Court nor the CCA has the power to prevent the Department of Homeland Security, Immigration and Customs Enforcement division, from exercising its deportation powers.

> affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are *final and conclusive*. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, *subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74)*, and the authority of the President.

(emphases added).

The language of the statute suggests that once appellate review is complete, the findings and sentence are "final and conclusive," subject only to action upon a petition for a new trial pursuant to Article 73, UCMJ, remission and suspension actions by the service secretaries, pursuant to Article 74, UCMJ, or presidential action.[6] No exception is listed for writs of coram nobis or other collateral review.

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[6] Despite this clear statutory limitation the majority cites *United States v. Davis*, 63 M.J. 171, 176-77 (C.A.A.F. 2006), for the proposition that "[w]hen court-martial jurisdiction has been invoked properly at the time of trial, the jurisdiction of the Court of Criminal Appeals to review the case does not depend on whether a person remains in the armed forces at the time of such review." *Denedo*, ___ M.J. ___ (25). In *Davis*, unlike the current case, direct review had not been completed; therefore the case was not yet final. 63 M.J. at 176. Nothing in *Davis* or the cases cited therein serves as precedent for the concept that there is "continuing jurisdiction" over cases that are final under Article 76, UCMJ.

A. Finality Does Not Preclude Collateral Review by Article III Courts

It was soon recognized that applying the literal language of Article 76, UCMJ, raised constitutional concerns because it would, implicitly, conflict with the Suspension Clause. *See* U.S. Const. art. I, § 9, cl. 2; *Schlesinger v. Councilman*, 420 U.S. at 751. Consequently the Supreme Court interpreted the finality provision to not deprive Article III courts of collateral review authority. But the Supreme Court did note that Article 76, UCMJ, "describe[s] the terminal point for proceedings within the court-martial system." *Schlesinger*, 420 U.S. at 750 (quoting *Gusik*, 340 U.S. at 132). And no one suggests that the Court of Appeals of the Armed Forces is not part of the "court-martial system." *See* Article 67, UCMJ (describing this Court's subject-matter jurisdiction over courts-martial).

Instead of taking the Supreme Court's opinion in *Schlesinger* at face value, the majority claims it supports the proposition that Article 76, UCMJ, is merely a "prudential bar" to review of final decisions. This is clearly so for an Article III court. But the majority does not recognize that there is a difference between what is "prudential" for an Article III court, and what is a statutory directive for an Article I, legislatively created court. While an Article III court may, if it wishes, step into the breach whenever constitutional justiciability requirements are satisfied, this Court is limited to acting only when our statutory grant so allows. *Goldsmith*, 526 U.S. at 535.

Schlesinger is not to the contrary. The statutory framework, as drafted by Congress, signed into law by the President, and interpreted by the Supreme Court,

counsels that we yield to the Article III courts once we have reached the "terminal point," as described by the finality provision in Article 76, UCMJ. That collateral review is so circumscribed is neither surprising nor unjust given the reality that, where a case is final for purposes of Article 76, UCMJ, the individual will almost certainly no longer be a servicemember.[7]

B. Ignoring the Effect of Article 76, UCMJ, Eviscerates the Statutory Scheme

The majority cites the text of Article 76, UCMJ, but avoids discussing the specific exceptions to finality listed therein. Having avoided the listed exceptions, it suggests that Article 76, UCMJ, is wholly "prudential" for both Article I and Article III courts. Given the holdings of the Supreme Court and the language of the statute, this interpretation is perplexing. The only exception to Article 76, UCMJ, finality recognized by the Supreme Court is Article III collateral review—i.e., review outside the military justice system. *Schlesinger*, 420 U.S. at 749. And the only exceptions to finality contained within Article 76, UCMJ, itself are petitions for a new trial under Article 73, UCMJ, remission or suspension under Article 74, UCMJ, or presidential action.

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[7] That Article 76, UCMJ, is bypassed by the majority as irrelevant to jurisdiction is surprising. Two years ago this Court, in response to the Government's argument that the Court did not have jurisdiction because a case was final, did not say that finality was irrelevant to its review. *Loving v. United States*, 62 M.J. 235, 240-45 (C.A.A.F. 2006). Instead, it went through a lengthy analysis to explain why the case was not, in fact, final under Article 76, UCMJ, although it ultimately concluded that it need not address whether this Court has jurisdiction after a case is final. *Id.*

Article 73, UCMJ, allows for collateral review within two years of convening authority action. Tellingly, this "special post-conviction remedy," *Burns v. Wilson*, 346 U.S. 137, 141 (1953), is vested not in this Court, but in the judge advocates general of each branch unless the case is pending before this Court or the CCA at the time the petition is made. An Article 73, UCMJ, petition for new trial, is the sole statutory provision for collateral review of final judgments by a court within our system. *See* Article 76, UCMJ. The decisions of at least two federal courts of appeal confirm this point, and today's decision creates a circuit split. *See Witham*, 355 F.3d at 505; *Gilliam*, 2000 U.S. App. LEXIS 3684, at *5, 2000 WL 268491, at *2. The position of these courts is consistent with the position of the solicitors general of the United States in *Gusik* and *Schlesinger*. Brief for Petitioners on the Jurisdictional Issues at 7, *Schlesinger*, 420 U.S. 738 (No. 73662); Brief for Respondent at 3-4, *Gusik*, 340 U.S. 128 (No. 110).

The majority opinion's contrary interpretation ignores both the language of the statute and the statutory limitations placed on claims for a new trial. Denedo's claim is nothing more than a petition for a new trial, dressed up as a writ of coram nobis.[8] For this Court to

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[8] A writ coram nobis must be directed at the court that issued the decision. *Lowery v. McCaughtry*, 954 F.2d 422, 423 (7th Cir. 1992); *see generally* Abraham L. Freedman, The Writ of Error Coram Nobis, 3 Temple L.Q. 365 (1929); Note, 37 Harv. L. Rev. 744 (1924). Because we do not have standing courts, the military justice system appears ill-suited to this form of relief, as this Court recently acknowledged. *See Loving*, 62 M.J. at 251-55. The majority's attempt to transmogrify the CCA into a trial court for the purpose of the analysis in this case is unfounded. The CCA is in no better position to rule on a writ coram nobis than the federal courts or we are. None were the original trial court.

permit a petition for a new trial to escape the statutory limitations placed upon it by Congress and allow this petition to proceed as a writ of coram nobis eviscerates Article 73, UCMJ, and renders Article 76, UCMJ's, finality provision meaningless. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

Today's decision is disturbing. By asserting it can act on a final case involving a person who is not within Article 2, UCMJ, and ignoring the clear language of the statutory scheme, the Court effectively asserts that it can review any case, at any time. There is now no terminal point for this Court's jurisdiction.

III. *Clinton v. Goldsmith Redux?*

The justification for today's opinion rests on tautologies, such as "Congress enacted the UCMJ under its power to regulate the armed forces," and "the military is an institution with distinct traditions and disciplinary concerns." These are truisms, and thus no doubt true. Of course, it is also true that Denedo is lawfully discharged from the military and that the Constitution only grants Congress the power, vis-à-vis this Court, to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14.

But the majority's justification is troubling not so much because it is misplaced, but because it is highly reminiscent of the position of this Court prior to the Supreme Court's decision in *Clinton v. Goldsmith*. At that time this Court, without statutory authority, asserted it

had collateral review power over cases that were final.[9] *Garrett v. Lowe*, 39 M.J. 293, 295 (C.M.A. 1994); *Del Prado v. United States*, 23 C.M.A. 132, 13334, 48 C.M.R. 748, 749-50 (1974); *United States v. Frischholz*, 16 C.M.A. 150, 151-53, 36 C.M.R. 306, 307-09 (1966).

It was upon those decisions, and the analysis that underlay them, that this Court's decision in *Goldsmith* rested. *See, e.g., Goldsmith v. Clinton*, 48 M.J. 84, 86 n.3 (C.A.A.F. 1998) (citing *Frischholz*, 16 C.M.A. at 151-52, 36 C.M.R. at 308 (stating that Article 67, UCMJ, does not describe the full powers of this Court; rather, the Court also possesses incidental powers as part of its responsibility under the UCMJ to protect the constitutional rights of members of the armed forces), and *Gale v. United States*, 17 C.M.A. 40, 42, 37 C.M.R. 304, 306 (1967) (stating that Congress intended to grant this Court "supervisory power over the administration of military justice")). Those decisions, contrary to the well-established principle of expressly limited jurisdiction of Article I courts, were based on the notion that this Court had plenary power over the administration of military justice and all things over which it once had jurisdiction. *See Goldsmith*, 48 M.J. at 86-87 (stating

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[9] *Goldsmith* was a final case heard on collateral review. 526 U.S. at 532-33. While the Supreme Court could have decided *Goldsmith* based on finality, that issue was not raised, and it decided the case based on an arguably more important jurisdictional theory—that this Court does not have plenary power over everyone and everything that has, at some point, touched the military justice system. *Id.* at 536. Applying the logic of the Court's opinion in *Goldsmith*— a strict interpretation of this Court's legislative grant of authority—to Articles 2, 67, and 76, UCMJ, yields a result opposite to the conclusion reached by the majority in this case.

that "Congress intended for this Court to have broad responsibility with respect to the administration of military justice"). Given that this analytic framework was expressly rejected by the Supreme Court when it reversed our decision in *Goldsmith*, it is both significant and surprising that the majority relies upon these cases today.

When the Supreme Court overturned this Court's *Goldsmith* opinion, it made it clear that this Court occupied only a small plot of the judicial landscape, and that that plot was circumscribed by statute. *Goldsmith*, 526 U.S. at 533-35. Inexplicably, this Court appears determined not to heed the Supreme Court's unequivocal directive that it stay squarely within the express limits of statutory jurisdiction.[10]

IV. *Denedo's Claims Are Not Uniquely Military in Nature, and Collateral Review is Not Foreclosed in an Article III Court*

Today's decision is particularly odd given the facts of this case. The majority appears to argue that this Court must review Denedo's case because it involves unique aspects of military justice. If we do not review, the argument goes, no one can or will. This logic is flawed, as both premises are unsound.

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[10] The majority's reliance on footnote eleven of *Goldsmith* is misplaced. There, the Supreme Court cited, *inter alia*, *Noyd v. Bond*, 395 U.S. 683, 693-99 (1969), and *Burns v. Wilson*, 346 U.S. at 142, for the proposition that once a servicemember had exhausted his military remedies, final decisions of the military justice system could be collaterally reviewed under 28 U.S.C. §2241(c) (2000), by Article III courts. In *Goldsmith*, the Supreme Court said nothing about collateral review of final judgments by this Court after a petitioner had exhausted the remedies outlined in Article 76, UCMJ.

First, there is nothing uniquely military about this case. While this case, or any case for that matter, can be cloaked in military justice rhetoric, this is essentially a garden variety claim of ineffective assistance of counsel, coupled with an argument regarding an immigration problem.

Denedo, who is a civilian, claims he could not have raised his Sixth Amendment claim before now. This constitutional claim is grounded in conversations that transpired between Denedo and his civilian defense counsel and the intricacies of federal immigration law. Neither this Court nor the CCA has a record of Denedo's conversation with his civilian lawyer, special knowledge beyond that of an Article III court of the myriad ways to prove ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), or any expertise with respect to immigration law. There is no colorable argument that this Court is in a better position to review this claim than an Article III court.

Nor is it correct that this Court is the sole option on collateral review if the correct standard is applied. The fact that this Court had not weighed in on Denedo's claim would not have been dispositive of whether an Article III court would address the merits of his claim, because he claims that he only recently learned of violation of his constitutional rights, *i.e.*, after direct review was completed. *Roberts v. Callahan*, 321 F.3d 994, 995 (10th Cir. 2003) (citing *Lips v. Commandant, United States Disciplinary Barracks*, 997 F.2d 808, 811 (10th Cir. 1993)) (stating that there is an exception to exhaustion and waiver requirements on collateral review when the petitioner can show actual prejudice and good cause why the petition had not been previously brought);

Hatheway v. Sec'y of Army, 641 F.2d 1376, 1380 (9th Cir. 1981), *abrogated on other grounds by High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (Article III courts will collaterally review a final court martial when the military courts have not given "full and fair consideration" to the petitioner's claim); *Calley v. Callaway*, 519 F.2d 184, 203 (5th Cir. 1975) ("Military court-martial convictions are subject to collateral review by federal civil courts . . . where . . . exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice."). A federal court may or may not determine that Denedo's claim constitutes a serious constitutional claim warranting collateral review of a final judgment. *See Matias v. United States*, 923 F.2d. 821, 825 (Fed. Cir. 1990). But if it determines review is warranted, there is nothing to prevent its review or development of facts *not* resolved by military courts because they arose after the case was final and the military justice system had no jurisdiction under the UCMJ.

The majority's discussion of the collateral review exhaustion requirement ignores the point that the exhaustion problem is one that it creates today. The majority opinion relies on four federal district court cases for the proposition that an Article III Court will not entertain Denedo's writ. *Tatum v. United States*, No. RDB-06-2307, 2007 U.S. Dist. LEXIS 61947, at *12-*13, 2007 WL 2316275 at *7 (D. Md. Aug. 7, 2007); *Fricke v. Sec'y of the Navy*, No. 03-3412-RDR, 2006 U.S. Dist. LEXIS 36548, at *9-*14, 2006 WL 1580979 at *2-*5 (D. Kan. June 5, 2006); *MacLean v. United States*, No. 02-CV-2250-K, 2003 U.S. Dist. LEXIS 27219, at *13-*15 (S.D. Cal. June 6, 2003); *Parker v. Tillery*, No. 95-3342-RDR, 1998 U.S. Dist. LEXIS 8399, at *3*5, 1998

WL 295574 at *1-*2 (D. Kan. May 22, 1998). But none of those cases addresses evidence discovered after the petitioner's case was final, and each assumes that the petitioner could have brought an extraordinary writ in the military justice system. If this Court had held that no jurisdiction exists over either a civilian with no relationship to the military or a case once it is final under Article 76, UCMJ, Denedo would have been able to file his claim in an Article III court without fear of a dismissal based on exhaustion.

V. *Conclusion*

There is no question that Congress intended this Court to be the final court of review within the military justice system and to review those cases and matters it placed within our limited grant of jurisdiction. Those judgments are entitled to deference by the Article III Courts, which generally will not conduct de novo review of claims we have considered or permit collateral review of questions of fact we resolved. *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 409 (D.C. Cir. 2006); *Witham*, 355 F.3d at 505; *McElhaney v. Erker*, 98 Fed. Appx. 417, 418 (6th Cir. 2004); *Roberts*, 321 F.3d at 995; *Brosius v. Warden*, 278 F.3d 239, 245 (3d Cir. 2002); *Matias*, 923 F.2d. at 826; *Hatheway*, 641 F.2d at 1379; *Allen v. VanCantfort*, 436 F.2d 625, 629 (1st Cir. 1971); *Harris v. Ciccone*, 417 F.2d 479, 481 (8th Cir. 1969); *see also* 129 Cong. Rec. 24, 34,312-13 (1983).

But the statutory scheme does not permit this Court to exercise jurisdiction over a civilian's case that is final, in derogation of Articles 2, 67, 69, 73, and 76, UCMJ, and in the absence of a specific legislative grant of authority. On the contrary, the scheme suggests that in the absence of a military remedy, a petitioner may seek

relief from an Article III court. As the statutory scheme does not confer jurisdiction over a civilian who has severed all connection to the military or allow for review once a decision is final under Article 76, UCMJ, I believe the Court should dismiss Denedo's petition, thereby allowing him to pursue his claim in an Article III court.[11] "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts." *Reid*, 354 U.S. at 21. Today we encroach on Article III jurisdiction without reason.

I respectfully dissent.

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[11] Because I conclude that the Court does not have jurisdiction, I would not reach the substantive issue in this case. I do note, however, that the majority appears to ignore the most recent precedent on the intersection of ineffective assistance of counsel and the collateral consequences of a court-martial, *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006), as well as precedents that are contrary to *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005). *See Jiminez v. United States*, 154 Fed. Appx. 540, 541 (7th Cir. 2005); *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004); *United States v. Gonzalez*, 202 F.3d 20, 25-28 (1st Cir. 2000).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Misc. Dkt. No. 07-8012/NA
Crim. App. Dkt. No. 99-00680

JACOB DENEDO, APPELLANT

v.

UNITED STATES, APPELLEE

ORDER

On consideration of Appellee's petition for reconsideration of this Court's decision, 66 M.J. 114 (C.A.A.F. 2008), it is, by the Court, this 4th day of April, 2008,

ORDERED:

That said petition for reconsideration be, and the same is, hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (FREEDUS, Esq.)
Appellate Government Counsel (KELLER)

APPENDIX C

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

NMCCA No. 9900680

JACOB DENEDO 7347 MESS MANAGEMENT SPECIALIST SECOND CLASS (E5) U.S. NAVY, PETITIONER

v.

UNITED STATES, RESPONDENT

Apr. 15, 2002

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF ERROR CORAM NOBIS

ORDER

On 12 March 2007 the appellant filed a Petition for Writ of Error *Coram Nobis*, the supporting brief, and a Motion to Attach. The Government filed a combined Motion for Leave and Motion to Dismiss Petition for Writ of Error *Coram Nobis* on 15 March 2007. The petitioner filed an Opposition to Motion to Dismiss Petition for Writ of Error *Coram Nobis* on 19 March 2007. Having considered the pleadings of the parties, it is, by the Court, this 26th day of March 2007,

ORDERED:

1. That the petitioner's Motion to Attach is granted.

2. That the Government's Motion for Leave is granted.

3. That the Government's Motion to Dismiss is denied.

4. That the Petition for Extraordinary Relief is denied.

For the Court

R.H. TROIDL
Clerk of Court
15 April 2002

Copy to:
NMCCA (72)
Matthew Freedus (Fax 202-293-8103)
45 (LT Mizer)
46 (LCDR Bunge)
02

[Seal Omitted]

APPENDIX D

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

NMCM 99 00680

UNITED STATES

v.

JACOB DENEDO, MESS MANAGEMENT SPECIALIST
SECOND CLASS (E-5), U.S. NAVY

Decided: Feb. 24, 2000

BEFORE: R.B. LEO, D.A. ANDERSON, K.J. NAUGLE

Sentence adjudged 15 July 1998. Military Judge: G.E. Champagne. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS John F. Kennedy (CV 67).

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

In accordance with his pleas, the appellant was convicted by a miliary judge sitting as a special court-martial of conspiracy and larceny, in violation of Articles 81 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 921 (1994). He was awarded a bad-conduct

discharge, confinement for three months, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the single assignment of error[1] raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and the Government's response. After careful consideration, we conclude the findings and sentence to be correct in law and fact and find no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. Specially, we find the sentence is not inappropriately severe.

Background

The appellant conspired to steal money from Bethune-Cookman College (BCC) in Florida with a co-conspirator who apparently worked in the accounting department of that educational facility. The larceny was accomplished by the co-conspirator stealing checks from that facility, having forged endorsements inscribed, and negotiating the stolen forged checks through the appellant's credit union account. In this manner, 15 checks totaling $28,068.50 drawn on BCC's account were deposited into the appellant's account during December 1997. Thereafter, he withdrew the funds and disbursed the ill-gotten proceeds to his co-conspirator, keeping some portion for himself. There is some evidence that the appellant may have made restitution of some portion of the $28,068.50 to BCC. Prior to this criminal behavior, the appellant had a superior military record and remained well thought of by his supervisors even after the crime

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[1] THE SENTENCE IS INAPPROPRIATELY SEVERE FOR APPELLANT'S RELATIVE MINOR OFFENSES.

came to light. The co-conspirator is not a miliary member and apparently had not been prosecuted by civil authorities at the time of the appellant's court-martial.

Inappropriately Servere Sentence

A court-martial is free to impose any legal sentence that it determines is appropriate. *United States v. Turner*, 14 C.M.A. 435, 437, 34 C.M.R. 215, 217 (1964). We may not affirm a sentence, however, that we are not convinced is appropriate. Art. 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c) (1994). Sentence appropriateness involves the judicial function of ensuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1998).

We are fully mindful of appellant's prior honorable service, deployments, and his expressed contrition during his unsworn statement to the court below. However, these matters were considered by the military judge who imposed the sentence. They were also considered by the convening authority who acted on that sentence following his own review, consideration of the record, and contemplation of the sentence limitation portion of the pretrial agreement provisions negotiated by appellant, which in this case extended only to referral to a special court-martial.

We believe that this assignment of error is nothing more than a request for clemency. We determine sentence appropriateness, and not matters of clemency. Clemency, which involves bestowing mercy, is the prerogative of the convening authority. *Healy*, 26 M.J. at 395-96 (C.M.A. 1988); RULE FOR COURTS-MARTIAL 1107(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). The convening authority, who was

the appellant's best chance for clemency, apparently believed that the appellant expended all the currency his prior service earned him, as he granted no further clemency beyond the referral to a special court-martial.

We believe the appellant misperceives the gravamen of his crimes when he refers to them as "relatively minor offenses." Considering this appellant, his prior honorable service, and the crimes he admitted committing, we do not find that the sentence is inappropriately severe.

Accordingly, we affirm the findings and the sentence as approved below.

For the Court

/s/ CHRISTINE E. SHEEHY
CHRISTINE E. SHEEHY
Clerk of Court (Acting)

[Seal Omitted]

APPENDIX E

1. 10 U.S.C. 802 provides:

Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who—

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of—

(A) investigation under section 832 of this title (article 32);

(B) trial by court-martial; or

(C) nonjudicial punishment under section 815 of this title (article 15).

(2) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was—

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not—

(A) be sentenced to confinement; or

(B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

(e) The provisions of this section are subject to section 876b(d)(2) of this title (article 76b(d)(2)).

2. 10 U.S.C. 803 provides:

Art. 3. Jurisdiction to try certain personnel

(a) Subject to section 843 of this title (article 43), a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

(d) A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.

3. 10 U.S.C. 866 provides:

Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

4. 10 U.S.C. 867 provides:

Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed

Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

5. 10 U.S.C. 871 provides:

Art. 71. Execution of sentence; suspension of sentence

(a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.

(b) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and—

(A) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

(B) such a petition is rejected by the Court of Appeals for the Armed Forces; or

(C) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

(ii) such a petition is rejected by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(2) If a sentence extends to dismissal or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action on that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.

(d) The convening authority or other person acting on the case under section 860 of this title (article 60) may suspend the execution of any sentence or part thereof, except a death sentence.

6. 10 U.S.C. 873 provides:

Art. 73. Petition for a new trial

At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

7. 10 U.S.C. 876 provides:

Art. 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President.

8. 28 U.S.C. 1651 provides:

Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
OCT 27 2008
OFFICE OF THE CLERK

No. 08-267

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JACOB DENEDO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Under 28 U.S.C. § 1259(4)—the jurisdictional statute which the government invokes, Pet. 2—the Court may review "[c]ases . . . in which the Court of Appeals for the Armed Forces has granted relief." Does this Court have jurisdiction under that provision where the Court of Appeals remands to a lower court for further proceedings to "determine whether the requested relief should be granted"?

2. May the military appellate courts issue a writ of error coram nobis where the claim arises after a conviction has become final and no other remedy is available?

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BRIEF IN OPPOSITION

JURISDICTION

The Court lacks jurisdiction. *See* pp. 4-6 *infra*.

STATEMENT

Jacob Denedo, a Nigerian who came to the United States as a student and eventually became a permanent resident, enlisted in the United States Navy in 1989. After two reenlistments, he was convicted in 1998 by a special court-martial for larceny and conspiracy to commit larceny. He was sentenced to three months' confinement, reduction to the lowest enlisted pay grade, and a bad-conduct discharge. He had pleaded guilty in reliance on the explicit (and flatly incorrect) assurance of his civilian defense counsel, Michael A. Ceballos, that conviction by a special court-martial would not expose him to any risk of deportation because conviction by such a court—unlike conviction by a general court-martial—is a federal misdemeanor. The Navy-Marine Corps Court of Criminal Appeals ("the Navy Court") affirmed on February 24, 2000, and on May 30, 2000, Mr. Denedo was discharged.

Mr. Denedo applied for naturalization in 2002. The Immigration and Naturalization Service ("INS") denied his application, without prejudice, on the ground that his conviction reflected a lack of good moral character during the statutorily-prescribed period. The INS again denied his application without prejudice when he reapplied the following year.

On October 30, 2006, after expiration of the latest possible date for seeking collateral review of his conviction in federal district court or the Court of Federal Claims, 28 U.S.C. §§ 2401(a), 2501, the INS's successor agency (U.S. Citizenship and Immigration Services) did precisely what Mr. Ceballos assured him the government could not do—it initiated removal proceedings based on the court-martial. The notice to appear treated it as an "aggravated felony" under the Immigration and Nationality Act ("INA"). 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

In addition to having advised Mr. Denedo that his conviction would constitute a misdemeanor (and hence could not be used to deport him), Mr. Ceballos never informed him that the 1996 INA amendments had expanded the definition of "aggravated felony." Those amendments reduced the minimum term of imprisonment for theft offenses under § 1101(a)(43)(G) from "at least five years" to "at least one year" and reduced the minimum amount of loss in fraud cases under § 1101(a)(43)(M) from "$200,000" to "$10,000."[1] *See* Pub. L. No 104-208, 110 Stat. 3009 (1996), amending 8 U.S.C. §§ 1101(a)(43)(G), (M). Having no independent knowledge of the term "aggravated felony" or the INA and its amendments, Mr. Denedo relied on Mr. Ceballos to inform him as to the state of the law and the consequences of his plea.

Upon receiving notice of the removal proceedings, Mr. Denedo secured other counsel and petitioned for a writ of error coram nobis from the Navy Court. The

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[1] The larceny to which Mr. Denedo pleaded guilty involved a loss in excess of $10,000.

relief he sought was an order setting aside his guilty plea. The Navy Court denied a government motion to dismiss for lack of jurisdiction, but denied relief on the merits without explanation. Pet. 63a.

Mr. Denedo filed a timely writ appeal with the Court of Appeals for the Armed Forces, which held that it had jurisdiction to grant the requested relief but rather than doing so, remanded for further proceedings. Pet. 32a. "If prejudice is found," the majority wrote, "the [Navy C]ourt shall determine whether the requested relief should be granted." *Id.* Two judges dissented. Pet. 32a, 40a.

Mr. Denedo has long since served his sentence.

In light of the extended period of time this case may remain before the other courts involved, the Immigration Court, without objection from the Department of Homeland Security, administratively closed the removal proceedings on October 17, 2008. Mr. Denedo remains subject to deportation.

Unbeknownst to Mr. Denedo, Mr. Ceballos had begun to suffer from the effects of alcohol abuse, including occupational impairment, and entered into an agreement in August 1997 with Florida Lawyers Assistance, Inc. to participate in an alcohol rehabilitation program. Even though he failed to stay sober, he continued to practice until May 2000, when he entered a conditional guilty plea in response to bar complaints. He admitted violating the Florida Rules of Professional Conduct by, among other things, failing to adequately advise clients. Later that year, the state supreme court suspended him from practice for 30 days and placed him on probation for two years with alcohol rehabilitation treatment. His parents

had him involuntarily committed in November 2000 because his "extreme consumption of alcohol made him a danger to himself and others." In 2001, he was suspended on an interim basis, *Florida Bar v. Ceballos*, 786 So. 2d 1190 (Fla. 2001), and placed on inactive status. *Florida Bar v. Ceballos*, 791 So.2d 1102 (Fla. 2001). In 2002, he was indefinitely suspended. *Florida Bar v. Ceballos*, 832 So. 2d 106 (Fla. 2002). He received reciprocal discipline in other jurisdictions. *E.g., In re Ceballos*, 797 A.2d 1258 (D.C. 2002). Florida reinstated him on three years' probation shortly after the government sought certiorari. *Florida Bar v. Ceballos*, No. SC07-548 (Fla. Sept. 10, 2008). Mr. Denedo was unaware of Mr. Ceballos's impairment or unprofessional conduct until after the INS initiated removal proceedings.

The gravamen of Mr. Denedo's claim for a writ of error coram nobis is that incorrect legal advice rendered his plea involuntary. He has no other remedy.

REASONS FOR DENYING THE PETITION

A. The Court Lacks Jurisdiction

This Court lacks jurisdiction.

The petition invokes 28 U.S.C. § 1259(4), under which the Court may review "[c]ases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces has granted relief."

A jurisdictional statute must be construed with precision and fidelity to its terms, particularly when it authorizes appeal to this Court. *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S.

577, 581 (1982). Using this principle, § 1259(4) does not apply here for the simple reason that the Court of Appeals did not "grant[] relief." It merely remanded, and plainly indicated that the merits of Mr. Denedo's claim remained unadjudicated:

> [W]e remand Appellant's petition to the United States Navy-Marine Corps Court of Criminal Appeals for further proceedings, where the Government will have the opportunity to obtain affidavits from defense counsel and submit such other matter as the court deems pertinent. The Court of Criminal Appeals will then determine whether the merits of Appellant's petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required under *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). The court will determine whether Appellant's counsel rendered deficient performance and, if so, whether such deficiency prejudiced Appellant under *Strickland v. Washington*, 466 U.S. 668 (1984). *If prejudice is found, the court shall determine whether the requested relief should be granted.*

Pet. 32a (emphasis added).

A remand, without relief, is not "relief." It is merely a procedural step that may lead to adjudication of the merits. "Relief" is the substance of what the moving party seeks and what the court finds he or she is entitled to. *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 706 (7th Cir. 1999) (Posner, C.J.).

Mr. Denedo's petition sought quintessential coram nobis relief—an order setting aside his plea.[2] The Court of Appeals neither issued such an order nor found him entitled to one. While the "further proceedings" on remand could yield the relief he seeks, that is far from preordained. Because, as the Court of Appeals recognized, relief may yet be denied, Pet. 32a, it cannot be said that that court "has granted relief," as § 1259(4) requires.[3]

B. The Case Does Not Satisfy The Standards Governing The Grant Of Certiorari

The petition should be denied because it meets none of the criteria for certiorari and in any event the decision below is correct. *United States v. Morgan*, 346 U.S. 502, 511 (1954), holds that in extraordinary cases "where circumstances compel such ac-

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[2] *See, e.g., United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) (erroneous advice on immigration consequences of guilty plea); *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002) (same); *see generally* 39 Am. Jur. 2d *Habeas Corpus* § 271 at 423 (1999) ("If the triumphant coram nobis petitioner has served the sentence and is no longer incarcerated, the conviction is vacated and the petitioner's record of conviction expunged"). In the rare coram nobis case in which the Court of Appeals does grant relief, its order is unambiguous. *E.g., Del Prado*, 23 U.S.C.M.A. 132, 48 C.M.R. 748 at 750 (declaring conviction null and void, directing expungement and restoration of rights and privileges).

[3] It is of no moment from the standpoint of this Court's jurisdiction that—if relief is ultimately denied—examination of the correctness of the Court of Appeals' ruling as to *its* jurisdiction would have to await some future case. Whether the "relief" clause, which (notwithstanding this case) operates overwhelmingly to the accused's detriment and the government's benefit, is wise or unwise is not for this Court to determine.

tion to achieve justice," litigation may continue despite finality. Coram nobis is allowed without limitation of time for "facts that affect the 'validity and regularity' of the judgment." *Id.* at 507. This is such a case.

1. Contrary to the government's position, Pet. 8-12, and Judge Ryan's dissent, Pet. 54a-56a, there is no conflict with *Clinton v. Goldsmith*, 526 U.S. 529 (1999). Major Goldsmith did not challenge the findings or sentence of his court-martial. Rather, he sought extraordinary relief with respect to an order dropping him from the rolls. That was an administrative action, not a punishment "that was (or could have been) imposed in a court-martial proceeding." *Id.* at 530. As a result, this Court was right to find that the Court of Appeals exceeded its authority. In stark contrast, Mr. Denedo challenged his guilty plea and conviction, the very core of the court-martial process, rather than a peripheral matter, as in *Goldsmith*.

2. Nor is there a conflict among the circuits. While Article III courts of appeals have occasionally noted that there is no express provision for collateral review within the military justice system, *see* Pet. 41a, the fact is that the All Writs Act, 28 U.S.C. § 1651(a), plainly applies to the Article I appellate military courts, and since the 1960s it has been settled law that those courts may grant extraordinary writs. *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969).

3. Contrary to the government's position and the views of the dissenting judges, Article 76, 10 U.S.C. § 876, does not stand in the way of Mr. Denedo's petition.

a. *Schlesinger v. Councilman*, 420 U.S. 738, 749 (1975), stands for the proposition that Article 76 is a prudential restraint and not a jurisdictional one. The provision "does not expressly effect any change in the subject matter jurisdiction of Article III courts," but "only defines the point at which military court judgments become final and requires that they be given res judicata effect." *Id.* Faced with this, the government improbably seeks to impose a different meaning on Article 76 depending on whether collateral relief is sought in the Article III courts or in the appellate military courts. Pet. 14-15. Nothing in the text supports such a distinction. Moreover, as Chief Judge Effron pointed out, Pet. 9a-10a, both *Schlesinger*, 420 U.S. at 753 n.26, and *Noyd*, 395 U.S. at 695 n.7, referred with approval to the Court of Military Appeals' decision in *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966), a landmark case in which the court, tellingly, concluded that it has jurisdiction to issue coram nobis relief post-finality. That court, like its successor, was created under Article I. Art. 141, UCMJ, 10 U.S.C. § 941. The government's proposed Article I/Article III distinction is also inconsistent with its clear implication, Pet. 18, that Mr. Denedo could seek relief in the Court of Federal Claims. Congress created that court under Article I. 28 U.S.C. § 171(a). If, notwithstanding Article 76, *it* could grant Tucker Act relief in a final case, *see* p. 10 *infra*, it is difficult to see why the Article I Navy Court and the Article I Court of Appeals for the Armed Forces could not do so as well.

b. In *Goldsmith* the Court of Appeals acted after the case was final. Given that that case concerned the Court of Appeals' own jurisdiction, it is unlikely

that this Court would, as Judge Ryan suggested, Pet. 55a n.9, pass over in silence an Article 76 infirmity had there been one. Indeed, the Court expressly noted that "the approved findings and sentence in Goldsmith's case had become final," while providing an illustration that contradicts the position the government espouses here. *Goldsmith*, 526 U.S. at 536 & n.9.[4] Moreover, if Article 76 has the effect attributed to it by the government, then once a case becomes final, no military court could take action either to compel adherence to the judgment or to void a conviction for lack of jurisdiction. Judge Ryan's dissent acknowledges that both of these powers may be exercised notwithstanding Article 76, and does so without reference to any authority in the UCMJ. Pet. 46a-47a. Likewise, *Goldsmith* cites nothing in the UCMJ for the proposition that a military appellate court may grant extraordinary relief in a final case. 526 U.S. at 536. Since the military appellate courts are entirely creatures of statute, the only other basis for these powers can be the All Writs Act. The government's construction of Article 76 is at odds with *Goldsmith*.

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[4] In particular, *Goldsmith* indicated that if, rather than simply dropping an officer from the rolls, "a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to the specific provisions of the UCMJ," an appellate military court would have post-finality power under the All Writs Act to compel adherence to its own judgment. 526 U.S. at 536 (also noting government had conceded as much and citing *United States v. United States District Court*, 334 U.S. 258, 263-264 (1948)).

4. The government claims, Pet. 17-21, that a writ of error coram nobis is not "necessary or appropriate," as required by the All Writs Act because Mr. Denedo can invoke the district courts' federal question jurisdiction or the Court of Federal Claims' Tucker Act jurisdiction. Pet. 9, 17-19. This is incorrect. The six-year statutes of limitation for those forms of collateral review, 28 U.S.C. §§ 2401(a), 2501, expired before the removal proceedings were initiated and he became aware of the gross error in Mr. Ceballos's advice. *See Walters v. Secretary of Defense*, 725 F.2d 107, 114 (D.C. Cir. 1983) (limitation period begins to run when discharge is final), *reh'g denied*, 737 F.2d 1038 (1984) (en banc) (per curiam); *Goldstein v. United States*, 131 Ct. Cl. 228, 130 F. Supp. 330, 332 (1955) (cause of action accrues on date of discharge).[5] Even if there were a doctrine of equitable tolling, *Bowles v. Russell*, __ U.S. __, 127 S.Ct. 2360, 2366 (2007), Mr. Ceballos was not a government official and his error cannot be imputed to the government. Mr. Denedo thus never had a remedy in any other court.[6]

5. The government points out, Pet. 19, that coram nobis is only available in the jurisdiction and court in which the conviction is adjudged. The former is

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[5] Mr. Denedo's discharge became final on May 30, 2000. By the time the INS initiated removal proceedings, on October 30, 2006, it was too late.

[6] The government is correct that Mr. Denedo could seek review of his discharge in the Board for Correction of Naval Records, Pet. 18 n.2, but that agency's function is limited, in court-martial cases, to implementing decisions of UCMJ reviewing authorities and sentence clemency. 10 U.S.C. § 1552(f). It is powerless to vacate a plea or set aside a conviction.

true but of no assistance to the government because Mr. Denedo applied for relief within the proper jurisdiction: the military courts. The latter is untrue. There being no standing trial court, he applied to the lowest appellate court within the same jurisdiction. The worst that can be said is that his petition should therefore have been labeled a petition for a writ of error coram *vobis*. Accepting this part of the government's argument would improperly "exalt nomenclature over substance," *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 164 (1984) (quoting *Browder v. Director, Ill. Dept. of Corr'ns*, 434 U.S. 257, 272 (1978) (Blackmun, J., joined by Rehnquist, J., concurring); and citing *Schlesinger v. Councilman*, 420 U.S. at 742 n.5), since coram *vobis* is among the recognized writs, *Loving v. United States*, 62 M.J. 235, 252 (C.A.A.F. 2005) (writ petition submitted to superior court is writ of error coram vobis); *see, e.g., Thornton v. Bruton*, 18 M.J. 412 (1984) (mem.), and a proper vehicle for seeking post-conviction relief from an appellate court such as the Navy Court or the Court of Appeals. The substance of the writ governs, not the label. *E.g., Loving*, 62 M.J. at 252 & n.108, citing 2 STEVEN CHILDRESS & MARTHA DAVIS, FEDERAL STANDARDS OF REVIEW § 13.01, at 13-8 (3d ed. 1999).[7]

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[7] Judge Ryan's suggestion that Mr. Denedo's claim is "nothing more than a petition for a new trial, dressed up as a writ of coram nobis," Pet. 53a & n.8, is equally wide of the mark. Under Article 73, a new trial petition must be based on newly discovered evidence or fraud on the court. 10 U.S.C. § 873. Mr. Ceballos's misadvice does not fall within either category.

6. The government's claim, Pet. 21, that the decision below will divert military resources is unfounded (as well as irrelevant to the question of jurisdiction). Even though coram nobis has been available from the military courts for decades, *see Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306; *Del Prado v. United States*, 23 U.S.C.M.A. 132, 48 C.M.R. 748 (1974), such cases remain an infinitesimal part of the workload of the courts of criminal appeals and the Court of Appeals. In the last 10 years for which data are available, the Court of Appeals received only 10 coram nobis petitions.[8] During the same decade, there were also 176 "writ appeals." Even if a substantial portion of those cases sought coram nobis relief, they would still not unduly burden the military justice system.

7. Invoking *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955), the government argues, Pet. 15-16, that Mr. Denedo cannot be heard because, having been discharged, he is no longer subject to trial by court-martial. This misuse of *Toth* conflates personal jurisdiction and appellate subject-matter jurisdiction. The latter is not contingent on the former.[9] The government's contrary claim proves too

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[8] The Court of Appeals' annual reports are available at http://www.armfor.uscourts.gov/Annual.htm (last visited Oct. 21, 2008).

[9] For example, execution of a punitive discharge "does not deprive the Court [of Appeals] of jurisdiction to grant a petition for review." *United States v. Engle*, 28 M.J. 299 (C.M.A. 1989) (per curiam). The court's jurisdiction is also unimpaired by the fact that the accused has been released from active duty, *e.g.*, *United States v. Woods*, 26 M.J. 372 (C.M.A. 1988); *United States v. Jackson*, 3 M.J. 153 (C.M.A. 1977); *United States v. Entner*, 15 U.S.C.M.A. 564, 36 C.M.R. 62 (1965); *United States*

much because, if valid, it would mean that the Article III courts and the Court of Federal Claims, *neither of which can try courts-martial*, also could not grant relief in respect of a final court-martial, even though the government agrees that they can.

8. The government's suggestion, Pet. 23-24, that the military justice system lacks power to compel testimony by discharged coram nobis petitioners is without merit. Civilians are subject to subpoena under the UCMJ. Arts. 46-47, UCMJ, 10 U.S.C. §§ 846-47; R.C.M. 703(e)(2)(G)(i); *United States v. Ortiz*, 35 M.J. 391, 393 (C.M.A. 1992); *United States v. Hinton*, 21 M.J. 267, 270-71 (C.M.A. 1986). In any event, there is no reason to believe a coram nobis petitioner would not appear voluntarily, since absence would doom his or her petition, whether for failure to prosecute, abandonment, or failure of proof.

The government's related suggestion, Pet. 24, that even allowing punitively discharged personnel to enter a military installation for the purpose of appearing at a coram nobis hearing would harm the government is also unfounded. The military justice system has long conducted post-trial hearings that involve accused, civilian witnesses, and spectators whose interests may be adverse to the government. The government also has ample tools for dealing

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v. *Green*, 10 U.S.C.M.A. 561, 28 C.M.R. 127 (1959); *United States v. Speller*, 8 U.S.C.M.A. 363, 368, 24 C.M.R. 173, 178 (1957); *see also Steele v. Van Riper*, 50 M.J. 89 (C.A.A.F. 1999) (administrative discharge during pendency of appellate review did not affect power of convening authority or appellate courts to act on findings and sentence); *United States v. Sippel*, 4 U.S.C.M.A. 50, 52-54, 15 C.M.R. 50, 52-54 (1954) (appellate jurisdiction unaffected by expiration of officer's commission).

with misconduct by a coram nobis petitioner, including civilian prosecution, as well as expulsion and debarment from the installation.

9. Finally, the government cites, Pet. 25, five other decisions of the Court of Appeals that it believes reflect the court's profligate view of its own jurisdiction and support a call to "once again" clip its wings. That criticism is unjustified. For example, the government took completely inconsistent positions on the jurisdictional issue in *Lopez de Victoria*—the Army had argued (on behalf of the United States as appellee) against the Court of Appeals as having jurisdiction while the Air Force argued (on behalf of the same sovereign as amicus) for it. *United States v. Lopez de Victoria*, 66 M.J. 67, 69 n.3 (C.A.A.F 2008). Passing over that and the fact that the government elected not to seek certiorari in *Lopez de Victoria* or *Kreutzer*, and sought it and prevailed in *Goldsmith*, this slender catalog of cases hardly paints a picture of a court that is out of control and institutionally needs to be taught a lesson.

The irony is that in its effort to call into question the jurisdiction of the Court of Appeals the government has overlooked this Court's lack of jurisdiction over the petition. In any event the decision below is correct and does not warrant further review.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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REPLY BRIEF

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No. 08-267

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 08-267

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

The divided Court of Appeals for the Armed Forces (CAAF) held that Article I military appellate courts possess perpetual jurisdiction under the All Writs Act, 28 U.S.C. 1651, to review court-martial judgments that have long since become final. That decision warrants review and reversal because it cannot be reconciled with *Clinton* v. *Goldsmith*, 526 U.S. 529, 536 (1999), which makes clear that the All Writs Act does not give the CAAF "continuing jurisdiction * * * over all actions administering sentences that the CAAF at one time had the power to review"; it disregards key provisions of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, which expressly provide only for *direct* review of court-martial convictions; and it expands the jurisdiction of the military courts beyond the limits set by Congress. The result will be to place on the military justice system administrative burdens that it was not designed to bear

and to degrade its ability to function as an arbiter of discipline for the armed forces.

In response, respondent argues that this Court lacks jurisdiction to review the CAAF's decision under 28 U.S.C. 1259(4) because that court did not grant "relief." That is incorrect. The CAAF of course granted relief when it reversed the order of the Navy-Marine Corps Court of Criminal Appeals (N-MCCA)—which had denied respondent's petition—and remanded for further proceedings. Respondent's efforts to distinguish *Goldsmith* and defend the CAAF's decision on the merits are similarly unpersuasive. Certiorari is therefore appropriate to review the CAAF's decision on the fundamental jurisdictional question presented.

A. This Court Has Jurisdiction

This Court has jurisdiction to consider the petition under 28 U.S.C. 1259(4), which allows for review of "[c]ases, other than those described in" the preceding paragraphs of 28 U.S.C. 1259, "in which the Court of Appeals for the Armed Forces granted relief." Respondent maintains (Br. in Opp. 4-6) that the CAAF did not grant relief because—while it reversed the N-MCCA decision denying his petition—it simply remanded his case to the N-MCCA and did not itself set aside his conviction. That argument is contrary to the ordinary meaning of the term "relief," and it is inconsistent with the structure and purpose of Section 1259.

1. According to respondent (Br. in Opp. 6), he did not obtain "relief" from the CAAF because he sought "an order setting aside his plea" and instead received a remand to the N-MCCA. But Section 1259(4) requires only "relief," not "complete relief," and simply because respondent did not receive all the relief he sought, it

does not follow that he did not receive any relief at all. Indeed, in his petition to the CAAF, respondent sought an order "setting aside his guilty plea and grant[ing] such *other and further relief* as in the circumstances justice may require." C.A. Pet. 21 (emphasis added). Thus, respondent himself recognized the common-sense notion that the term "relief" can embrace a variety of remedies. See *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (per curiam) (recognizing that "effectual relief" can consist of a "partial remedy" in a party's favor).

Respondent's contrary argument ignores the CAAF's role as an appellate tribunal. A remand for further proceedings is a traditional and important form of relief for a party that lost in a lower court. Cf. *Lonchar* v. *Thomas*, 517 U.S. 314, 332 (1996) (discussing "the traditional habeas relief of a new trial"). In this case, a remand was the *only* relief the CAAF could have granted. Since the CAAF does not have fact-finding authority, it has no way to resolve a factual dispute arising in the context of a claim of ineffective assistance of counsel such as that raised by petitioner. See UCMJ Art. 67(c) (10 U.S.C. 867(c)) ("The Court of Appeals for the Armed Forces shall take action only with respect to matters of law."). Thus, a remand for a factual hearing—like the one ordered here, Pet. App. 32a—is the only remedy that the court can provide in such a case, and the CAAF itself properly views such a remedy as constituting "appellate relief." *United States* v. *Ginn*, 47 M.J. 236, 238 (C.A.A.F. 1997) (noting that "appellant has not averred or shown sufficient prejudice to now warrant a factfinding hearing or any other appellate relief").

2. The structure of 28 U.S.C. 1259 demonstrates that paragraph (4) (28 U.S.C. 1259(4)) permits certiorari review in cases where the CAAF remands a case to one of

the courts of criminal appeals. Each of the three preceding paragraphs in Section 1259 corresponds to one of the three provisions of Article 67(a) of the UCMJ that extends appellate jurisdiction to the CAAF. Thus, Section 1259(1) provides certiorari jurisdiction in capital cases, in which review by the CAAF is mandatory under Article 67(a)(1); Section 1259(2) provides certiorari jurisdiction in cases reviewed by the CAAF under Article 67(a)(2) at the direction of the Judge Advocate General of one of the armed forces; and Section 1259(3) provides certiorari jurisdiction in cases reviewed by the CAAF under Article 67(a)(3) upon the petition of the accused. Those three classes of cases exhaust the CAAF's appellate jurisdiction under Article 67, and therefore the only possible role for Section 1259(4) is to provide an avenue for certiorari review of decisions in which the CAAF has exercised its jurisdiction under the All Writs Act.

Significantly, in each of the preceding three categories of cases that are subject to certiorari jurisdiction, the remedy afforded the prevailing party may include a remand for further proceedings. See, *e.g.*, *United States* v. *Murphy*, 50 M.J. 4 (C.A.A.F. 1998) (remand in Article 67(a)(1) case); *United States* v. *Quintanilla*, 63 M.J. 29 (C.A.A.F. 2006) (remand in Article 67(a)(2) case); *United States* v. *Gilley*, 56 M.J. 113 (C.A.A.F. 2001) (remand in Article 67(a)(3) case). Yet nothing in Section 1259 suggests that a remand or other partial relief in the disposition of such cases forecloses certiorari review. There is no reason to suppose that Congress contemplated the more restrictive rule suggested by respondent with respect to decisions that are covered by Section 1259(4).[1]

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[1] Respondent's construction of the term "relief" is also at odds with the purpose of Section 1259. When that provision was enacted in 1983,

B. The CAAF's Decision Conflicts With *Goldsmith* And Contravenes Key Provisions Of the UCMJ

1. As explained in the petition (at 10-16), the judgment of the CAAF cannot be reconciled with this Court's decision in *Goldsmith*. Respondent maintains (Br. in Opp. 7) that in *Goldsmith*, the Court reversed the decision of the CAAF granting extraordinary relief under the All Writs Act simply because that court had exceeded its authority by reviewing an "administrative action" of military authorities that had no relationship to the judgment of a court-martial. That is incorrect. In *Goldsmith*, the Court rejected the broader proposition underlying the decision below in that case—*i.e.*, that the All Writs Act allows the CAAF to "oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." 526 U.S. at 536. And in language that is equally applicable to this case, it observed that "there is no source of continuing jurisdiction for the CAAF over

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the House committee report explained that, under prior law, "there [was] no authority for either party to seek Supreme Court review of decisions of the Court of Military Appeals," the predecessor to the CAAF. H.R. Rep. No. 549, 98th Cong., 1st Sess. 16. The Committee found that situation unacceptable because the Court of Military Appeals had "demonstrated a willingness to strike down provisions of the Manual for Courts-Martial and departmental regulations, and to interpret provisions of the Uniform Code of Military Justice in a manner that adds or detracts from procedural requirements or regulations," yet "the government [had] no judicial recourse from adverse decisions." *Ibid.* Respondent's construction of Section 1259(4) would continue to deny the government "judicial recourse from adverse decisions"—and would provide a means for the CAAF to insulate its own decisions from further review—in almost any case where the CAAF's adverse decision includes a remand for fact-finding, even where, as here, the decision involves an important question of law that warrants this Court's review.

all actions administering sentences that the CAAF at one time had the power to review." *Ibid.* The CAAF's exercise of jurisdiction in this case was not authorized by Article 67—the provision of the UCMJ that defines the CAAF's authority—and it is directly at odds with *Goldsmith*.

2. a. The CAAF's exercise of jurisdiction in this case was not only unauthorized by any statute; it was affirmatively prohibited by the finality rule of Article 76. Respondent repeats the CAAF's error when he observes (Br. in Opp. 8) that in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975) this Court construed Article 76 as a prudential rather than a jurisdictional restraint. As explained in the petition (at 14), *Councilman* so held only with respect to the subject-matter jurisdiction of *Article III* courts, and it emphasized that Article 76 "describ[ed] the terminal point for proceedings *within the court-martial system*," of which the CAAF is a part. 420 U.S. at 750 (emphasis added) (quoting *Gusik* v. *Schilder*, 340 U.S. 128, 132 (1950)).

Indeed, it has long been understood that, upon review and final approval of the judgment of a court-martial, a defendant has no further recourse within the military justice system, save a pardon by the President. See William Winthrop, *Military Law and Precedents* 54 (2d ed. 1920) ("[T]he judgment of a court-martial * * * is, within its scope, absolutely final and conclusive. Its sentence, if per se legal, cannot, after it has received the necessary official approval, be revoked or set aside; and it is only by the exercise of the pardoning power that it can * * * be rendered in whole or in part inoperative.") (footnote omitted). And the legislative history of Article 76 makes clear that Congress intended to continue that practice when it enacted the UCMJ, leaving

the federal courts as the sole recourse for post-finality relief from a court-martial conviction. See S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949) ("Subject only to a petition for a writ of habeas corpus in Federal court, [Article 76] provides for the finality of court-martial proceedings and judgments."). Nothing in *Councilman* casts doubt on the continuing vitality of that principle.

Respondent contends (Br. in Opp. 8) that if the Court of Federal Claims, an Article I court, can review a conviction notwithstanding Article 76, then "it is difficult to see why" the N-MCCA and the CAAF cannot do so as well. But unlike the CAAF, the Court of Federal Claims is not part of the military justice system, and therefore the finality provision of Article 76—as its terms make clear—is not a jurisdictional bar to that court's ability to review court-martial proceedings. Furthermore, the actions that have been allowed in the Court of Federal Claims are for backpay, and not the writ of error coram nobis proceeding at issue here. See Pet. 18.

b. Respondent observes (Br. in Opp. 8-9) that in *Goldsmith* the CAAF acted after the case was final, but that this Court did not challenge the propriety of its action on that basis. But that is beside the point because it was fully sufficient to the disposition of that case to hold that, given that nothing in the UCMJ afforded the CAAF continuing jurisdiction over cases that it once had the power to review, issuance of an extraordinary writ could not have been in aid of its existing jurisdiction. See *Goldsmith*, 526 U.S. at 534-535.

Nor is respondent correct when he suggests (Br. in Opp. 9) that the CAAF's action in this case is somehow analogous to "action * * * to compel adherence to the judgment," which *Goldsmith* indicated would be permissible. As the CAAF recognized, the purpose of the writ

of error coram nobis is to *alter or overturn* a judgment. Pet. App. 21a. There is a clear distinction, recognized in *Goldsmith*, between enforcing a judgment, which is permissible, and overturning a judgment or otherwise "act[ing] as a plenary administrator * * * of criminal judgments," which is not. 526 U.S. at 536.

c. The CAAF lacked jurisdiction for the additional reason that respondent has been lawfully discharged from military service and has no current relationship with the military. Respondent maintains (Br. in Opp. 12-13) that that argument "conflates personal and appellate subject-matter jurisdiction" and that, if it is correct, it would mean that the Article III courts and the Court of Federal Claims would lack jurisdiction to adjudicate claims arising from courts-martial convictions because they lacked personal jurisdiction over the accused at the time of his court-martial. But because the CAAF is part of the court-martial system, its appellate jurisdiction cannot extend to persons who are not subject to the UCMJ. In contrast, neither the Article III courts nor the Court of Federal Claims are so confined; instead, they possess jurisdiction to entertain the claims of anyone, including former members of the armed forces, as long as such claims fall within their statutory authority.

3. Even if there were some statutory jurisdictional basis for collaterally reviewing final court-martial judgments, the issuance of a writ of error coram nobis was improper under *Goldmith* because it was neither "necessary" nor "appropriate." 526 U.S. at 537.

a. Relief under the All Writs Act is not "necessary" to review a final court-martial conviction because alternative remedies exist in Article III courts and in the Court of Federal Claims. Respondent maintains (Br. in Opp. 10) that the statutes of limitations that govern

claims in those courts would preclude him from seeking such relief. But even assuming respondent could not have pursued relief earlier, particular factual circumstances in any given case are not a basis for the CAAF to expand its jurisdiction to classes of cases that have become final and that, as a general rule, are subject to adequate alternative remedies. In addition, in cases where the petitioner remains in custody, the remedy of habeas corpus will be available.

b. The issuance of a writ of error coram nobis was also not "appropriate" because that writ permits a court to correct its own errors, not those of an inferior court. Here, the judgment that respondent sought to attack was not issued by the CAAF or the N-MCCA; it was issued by a court-martial. Thus, neither the CAAF nor the N-MCCA could properly review that judgment by means of a writ of error coram nobis. Respondent asserts (Br. in Opp. 10-11) that "[t]he worst that can be said is that his petition should therefore have been labeled a petition for a writ of error coram *vobis*." But such a writ would have been equally inappropriate here. A writ of error coram vobis is "directed by a reviewing court to the court which tried the cause." *Nicks* v. *United States*, 955 F.2d 161, 166 (2d Cir. 1992). In this case, there is no tribunal to which a writ could be directed, since courts-martial are not standing bodies but are "ad hoc proceedings which dissolve after the purpose for which they were convened has been resolved." *Witham* v. *United States*, 355 F.3d 501, 505 (6th Cir. 2004). Whether labeled a writ of error coram nobis or a writ of error coram vobis, the relief granted by the CAAF was inconsistent with the common-law scope of the writ.

C. This Court's Review Is Warranted

The decision below incorrectly resolves a fundamental jurisdictional question and threatens to divert the limited resources of the military justice system from adjudicating courts-martial and direct appeals to addressing collateral challenges to convictions that have long since become final. Respondent observes (Br. in Opp. 12) that in the past ten years the CAAF received only ten petitions for coram nobis relief. But in just the months since the CAAF issued its decision in this case, the N-MCCA and the Army Court of Criminal Appeals—which bear the primary burden of adjudicating those petitions—have both experienced many post-finality petitions for extraordiary relief, including coram nobis, which now require adjudication on the merits when they should be dismissed for lack of jurisdiction.[2] Without this Court's intervention, the decision below will lead to a further diversion of resources that will degrade the ability of the military justice system to perform its intended function as the arbiter of discipline within the armed forces. And, in any event, even beyond those practical considerations, the basic jurisdictional question presented warrants resolution by this Court.

---

[2] See, *e.g.*, *Tatum* v. *United States*, No. 9202530, 2008 WL 4367497 (N-M.C. Ct. Crim. App. Sept. 23, 2008); *Echols* v. *United States*, No. 9801059 (N-M. Ct. Crim. App. July 31, 2008); *Hollis* v. *United States*, No. 9900297 (N-M. Ct. Crim. App. July 30, 2008); *Soto* v. *United States*, No. 20080698 (A. Ct. Crim. App. July 29, 2008); *Moultrie* v. *United States*, No. 20080652 (A. Ct. Crim. App. July 29, 2008); *Tillery* v. *ACCA*, Nos. 20080672, 20080673 (A. Ct. Crim. App. July 22, 2008); *Christian* v. *United States*, No. 20011021 (A. Ct. Crim. App. July 15, 2008); *Hobson* v. *United States*, No. 20080498 (A. Ct. Crim. App. June 25, 2008); *Reeder* v. *United States*, No. 20080907 (A. Ct. Crim. App. 2008).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

NOVEMBER 2008

JOINT APPENDIX

117 (H)

No. 08-267

Supreme Court, U.S.
FILED
JAN 9 - 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: AUG. 29, 2008
CERTIORARI GRANTED: NOV. 25, 2008

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OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

USCAAF Docket No. 07-8012/NA

JACOB DENEDO, APPELLANT

v.

UNITED STATES, APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
3/29/07	Writ-Appeal Petition for Review of the Navy-Marine Corps Court of Criminal Appeals Decision on Petition for Writ of Error Coram Nobis filed.
3/30/07	Docketing Notice issued.
3/30/07	Appellant's Motion to Substitute Corrected Copy of the Writ-Appeal Petition for Review of the Navy-Marine Corps Court of Criminal Appeals Decision filed.
	* * * * *
4/2/07	Order issued granting Appellant's Motion to Substitute Corrected Copy of the Writ-Appeal Petition for Review of the Navy-

DATE	PROCEEDINGS
	Marine Corps Court of Criminal Appeals Decision.
	* * * * *
4/9/07	Government Answer to Writ-Appeal Petition of the Navy-Marine Corps Court of Criminal Appeals Decision on Petition for Writ of Error Coram Nobis filed.
	* * * * *
4/11/07	Government Motion to Correct Errata filed.
4/11/07	Motion for Leave to File Brief as Amicus Curiae filed by the National Association of Criminal Defense Lawyers and to Suspend the Time Requirement of Rule 26(b).
4/12/07	Government Answer to the Motion for Leave to File Brief as Amicus Curiae filed.
	* * * * *
4/16/07	Order issued granting the Government's Motion to Correct Errata.
	* * * * *
4/20/07	Appellant's Reply to the Government's Answer to the Writ-Appeal Petition filed.
	* * * * *

DATE	PROCEEDINGS
4/24/07	Order issued granting the Motion of the National Association of Criminal Defense Lawyers to file Brief as Amicus Curiae and to Suspend the Time Requirement of Rule 26(b).
	* * * * *
5/7/07	Amicus Curiae brief of the National Association of Criminal Defense Lawyers filed in support of the Appellant.
	* * * * *
6/26/07	Oral argument Hearing Notice issued.
	* * * * *
10/1/07	Oral argument held.
	* * * * *
12/12/07	Supplemental Citation of Authority filed by Appellant under Rule 36A.
12/12/07	Motion for Leave to File Record of Immigration Court Proceedings filed by Appellant.
	* * * * *
12/28/07	Order issued granting Appellant's Motion for Leave to File Record of Immigration Court Proceedings.

DATE	PROCEEDINGS
	* * * * *
1/7/08	Motion for Leave to Withdraw Certain Arguments filed by the Government.
	* * * * *
3/11/08	Order issued to treat the Government's Motion for Leave to Withdraw Certain Arguments as a Motion To File a Document notifying the Court that Appellee no longer relies on a certain argument it advanced in it previous filings and oral argument, and granting such motion to file a document.
3/11/08	Opinion of the United States Court of Appeals for the Armed Forces issued remanding the case to the Navy-Marine Corps Court of Criminal Appeals for further proceedings.
3/11/08	Judgement of the Court issued.
	* * * * *
3/21/08	Petition for Reconsideration filed by the Government.
	* * * * *
3/27/08	Answer to the Petition for Reconsideration filed by the Appellant.

DATE	PROCEEDINGS
	* * * * *
4/4/08	Order issued denying the Government's Petition for Reconsideration.
	* * * * *
4/14/08	Mandate issued.
	* * * * *
6/23/08	Application to extend time to file a petition for a writ of certiorari to August 2, 2008, submitted to the Chief Justice of the Supreme Court of the United States.
6/23/08	Application to extend time granted by the Chief Justice to August 1, 2008.
	* * * * *
7/21/08	Application to extend further the time to file for a writ of certiorari to September 1, 2008, submitted to the Chief Justice.
7/21/08	Application to extend further the time to file granted by the Chief Justice until August 29, 2008.
	* * * * *
8/29/08	Petition for Writ of Certiorari filed. (Case No. 08-267)

DATE	PROCEEDINGS
	* * * * *
9/11/08	Order extending time to file response to petition to and including October 27, 2008.
	* * * * *
10/27/08	Brief of Respondent DENEDO in opposition filed.
	* * * * *
11/25/08	Petition for Writ of Certiorari granted.

Certified to be a true copy

/s/ WILLIAM A. DECICCO
WILLIAM A. DECICCO
Clerk
United States Court of Appeals
for the Armed Forces

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

NMCCA Docket No. 9900680

JACOB DENEDO, PETITIONER

v.

UNITED STATES, RESPONDENT

DOCKET ENTRIES

DATE	PROCEEDINGS
3/12/07	Ex Writ Received Code 40
3/12/07	Defense NMCCA Petition for Extraordinary Relief filed
3/12/07	Defense NMCCA brief filed
3/12/07	Defense NMCCA motion filed— M/Attach or file document
3/12/07	Docketed at NMCCA
	* * * * *
3/15/07	Government NMCCA motion filed—M/ eave
	* * * * *
3/19/07	Government NMCCA motion filed
	* * * * *

DATE	PROCEEDINGS
3/26/07	Sent to NMCCA panel
3/26/07	NMCCA order issued terminating case—Pet. Extra. Relief denied
	* * * * *
10/1/07	Oral Argument at CAAF
	* * * * *
3/21/08	Government CAAF extraordinary writ filed
	* * * * *
7/8/08	Opinion issued by CAAF
7/8/08	ROT received from CAAF
	* * * * *
11/25/08	Docketed at Supreme Court
11/25/08	Petition field at Supreme Court

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Case No. NMCM 99-00680

JACOB DENEDO, PETITIONER

v.

UNITED STATES, RESPONDENT

PETITION FOR WRIT OF CORAM NOBIS

DECLARATION OF JACOB DENEDO

---

1. I was born in Nigeria on January 22, 1957.

2. On or about May 23, 1984, I entered the United States on an F-1 student Visa. I attended Southwest University in Louisiana from 1984 to 1988, but did not complete the requirements to earn a bachelor's degree.

3. On October 18, 1986, I married a United States citizen.

4. In June 1989, I enlisted in the United States Navy as an E-3 for a term of four years.

5. On or about May 10, 1990, I became a lawful permanent resident.

6. On May 16, 1991, after having separated from my first wife, my girlfriend and I had a child Shannon Leigh Denedo. Shannon is a United States citizen.

7. In around December 1995, I was divorced from my first wife.

8. I served on active duty for nine consecutive years, from June 1989 until July 1998, as a Mess Management Specialist. I received two honorable discharges from the Navy and re-enlisted after each one. I advanced to the grade of Petty Officer Second Class.

9. On April 1, 1998, while assigned to the USS John F. Kennedy and home-ported in Jacksonville, I was charged with conspiracy to commit larceny, larceny and forgery under the Uniform Code of Military Justice.

10. In or around May 1998, I retained civilian defense counsel, Michael Alan Ceballos, to represent me. I was concerned that my detailed military defense counsel, Lieutenant Fernette L. Moore, would not be objective because she was a government employee and wore the same uniform as the military prosecutors.

11. I told Mr. Ceballos that I am a permanent resident alien and that my daughter is a United States citizen. I also told him that I had been living in the United States for the past 14 consecutive years and intend to remain here indefinitely. I also stressed that my primary concern and objective is to avoid the risk of deportation. I was far more concerned about that, and being separated from my family, than the risk of going to jail.

12. As of the date of this filing, I have resided in the United States for twenty-three consecutive years. I have three children, each of whom is a citizen of the United States.

13. Mr. Ceballos told me that, if I were to contest the charges, the government would likely refer them to a general court-martial. He explained that, if I was ac-

quitted at a general court-martial, there would be no conviction and therefore no deportation consequences. He also explained that, if I was convicted at a general court-martial, the conviction would be a federal felony and that a felony could be used as a basis for deportation.

14. On the other hand, Mr. Ceballos told me if I agreed to plead guilty at a special court-martial I would avoid any risk of deportation. He explained that a special court-martial conviction, unlike a general court-martial conviction, is a federal misdemeanor and therefore could not be used as a basis for deportation.

15. I told Mr. Ceballos that I would rather avoid the risk of deportation altogether than go to trial for the alleged offenses. He assured me that if I were to admit wrongdoing and plead guilty at a special court-martial, I would not face any risk of deportation based on the special court-martial conviction.

16. Lieutenant Moore was not present when I met with Mr. Ceballos and discussed my resident alien status and concerns about deportation. I never discussed those issues with Lieutenant Moore.

17. In reliance on the advice of Mr. Ceballos, I agreed to plead guilty at a special court-martial. It was my understanding, based on the advice of counsel, that by doing so I had avoided any risk of deportation.

18. At the time of trial I was fairly fluent in English even though it is my second language. I spoke with a heavy accent then, and still do.

19. Neither the judge nor trial counsel ever said anything to me about the risk of deportation or any other adverse immigration consequence of my guilty plea.

20. During the recess between the first and second day of trial, Mr. Ceballos told me that the government would back out of the pretrial agreement and refer the case to a general court-martial if I did not plead guilty. Mr. Ceballos also said that the judge would not accept my plea unless I said I "realized" I was engaging in criminal activity at some point before the bank froze my account.

21. Neither Mr. Ceballos nor my detailed defense counsel ever communicated with me after July 15, 1998 to discuss clemency or any other matter. I did not find out that a clemency request had been submitted on my behalf until I recently obtained a copy of my record of trial this past month.

22. I never spoke to a military appellate defense counsel about my case. I also never executed a power of attorney authorizing military appellate defense counsel to make decisions on my behalf.

23. On or about December 29, 2001, I married my second wife. We have two children, both of whom are United States citizens. Our first son was born on October 15, 2003 and our second son was born on November 6, 2005.

24. In around April 2002, I applied to the Immigration and Naturalization Service (INS) for naturalization. INS denied my application on the basis that my special court-martial conviction reflected a lack of good moral character during the statutory period prior to my application. INS indicated that its decision is without prejudice to my ability to reapply in the future. A copy of that decision is attached as to the Petition as Exhibit 2.

25. In around November 2003, I re-applied for naturalization. In August 2005, INS again denied my application without prejudice to my ability to re-apply in the future. A copy of that decision is attached as to the Petition as Exhibit 3.

26. On or about October 30, 2006, contrary to the advice I received from Mr. Ceballos, INS initiated deportation proceedings against me based exclusively on my special court-martial conviction. A copy of the notice to appear is attached to the Petition as Exhibit 4.

27. Mr. Ceballos never suggested to me that a special court-martial conviction could potentially qualify as an "aggravated felony." He never mentioned the term "aggravated felony." To the contrary, he simply stated that a special court-martial conviction is a misdemeanor conviction, not a felony conviction, and could not be used to deport me. He never said anything about any amendments to the laws governing the term "aggravated felony." I had no independent knowledge of the term, the Immigration and Nationality Act or any of its amendments, or the specific laws governing deportation. I relied on my counsel to inform me as to the state of the law and the consequences of my guilty plea, particularly with respect to my status as a resident alien.

28. I received notice of the deportation proceedings in November 2006. Thereafter, I contacted the law firm of Feldesman Tucker Leifer Fidell LLP in Washington, D.C. for its assistance.

29. With respect to the ongoing deportation proceedings, I had my initial appearance ("master calender hearing") before the Immigration Court on January 18, 2007. My next appearance is set for April 12, 2007. A copy of the notice for the next appearance is attached to

the Petition as Exhibit 7. I am not in custody. Vincent P. Martin, an immigration attorney in Eden Prairie, Minnesota, is representing me in the deportation proceedings.

30. I pled guilty in reliance on the advice of Mr. Ceballos that a special court-martial conviction is a misdemeanor conviction and could not result in deportation. That advice was the decisive factor in my decision to plead guilty. I would not have done so and, instead, would have insisted on going to trial had my counsel advise me that my guilty plea could result in deportation.

31. I did not discover that Mr. Ceballos had misadvised me as to the deportation consequences of my guilty plea until the government initiated deportation proceedings against me. I also did not discover that he was disciplined for unprofessional conduct until after the deportation proceedings were initiated.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 8, 2007.

_____

Jacob Denedo

[Stamp of Notary Public omitted]

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DETAINED?
☐ **YES**
☒ **NO**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

File No.: A 27 896 817

IN THE MATTER OF:
ALIEN: JACOB DENEDO

Removal Proceedings
Bloomington, MN (BLM)

Date: Dec. 6, 2007

DHS STATEMENT REGARDING AGGRAVATED FELONY CHARGES

The Department of Homeland Security did not intend to withdraw, and will not be withdrawing, the aggravated felony charges in this case.

Respectfully submitted,

Ann Tanke
Acting Chief Counsel

/s/ TERRY M. LOUIE
By: TERRY M. LOUIE
Senior Attorney

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JAN 9 - 2009
OFFICE OF THE CLERK

No. 08-267

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis filed by a former service member to review a court-martial conviction that has become final under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*

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In the Supreme Court of the United States

No. 08-267

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-60a) is reported at 66 M.J. 114. The order of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 62a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2008. A petition for reconsideration was denied on April 4, 2008 (Pet. App. 61a). On June 23, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 1, 2008. On July 21, 2008, the Chief Justice further extended the time to August 29, 2008, and the petition was filed on that date. The petition for a writ of certiorari

was granted on November 25, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1259(4).

STATUTES INVOLVED

Pertinent provisions are set out in an appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

This case concerns the statutory jurisdiction of the military courts—created by Congress pursuant to Article I of the Constitution—to adjudicate collateral challenges by former service members to court-martial convictions that have long since become final.

Following a guilty plea before a special court-martial, respondent was convicted of conspiracy to commit larceny, in violation of 10 U.S.C. 881, and 15 specifications of larceny, in violation of 10 U.S.C. 921. He was sentenced to three months of confinement, a bad-conduct discharge from the Navy, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence as adjudged. The Navy-Marine Corps Court of Criminal Appeals (N-MCCA) affirmed the findings and sentence. Respondent did not seek further review, and he was discharged from the Navy. Seven years later, respondent petitioned the N-MCCA for a writ of error coram nobis, alleging that he had received ineffective assistance of counsel. Pet. App. 3a-5a. The N-MCCA denied the petition. By a 3-2 decision, the United States Court of Appeals for the Armed Forces (CAAF) affirmed in part, reversed in part, and remanded for an evidentiary hearing. *Id.* at 1a-60a.

1. The Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14. Congress has exercised that authority in promulgating the

Uniform Code of Military Justice (UCMJ), which by its terms governs the conduct of, among others, "[m]embers of a regular component of the armed forces." 10 U.S.C. 802(a)(1).

As set forth in the UCMJ, Congress has established a military justice system consisting of three tiers of Article I tribunals. See *Weiss* v. *United States*, 510 U.S. 163, 166-169 (1994). The accused is provided military defense counsel under the UCMJ before each of those tribunals. See 10 U.S.C. 827, 870.

First, a court-martial is the body that tries persons charged with violations of the punitive articles of the UCMJ. See 10 U.S.C. 816-821. There are three kinds of courts-martial—general, special (used here), and summary—and the varying jurisdictions of those courts-martial to try certain crimes and to prescribe certain punishments are statutorily defined. *Ibid.* General and special courts-martial are composed of a military judge and, unless the accused chooses otherwise, no less than five or three service members, respectively. 10 U.S.C. 816. Unlike a federal district court, a court-martial is not a standing trial court but is convened (typically by a commanding officer) to hear a particular case. See 10 U.S.C. 822-824; Rules for Courts-Martial (R.C.M.) 401(c), 504; see also *Loving* v. *United States*, 62 M.J. 235, 254 (C.A.A.F. 2005) ("In the military system there are no standing [trial] courts."). Its jurisdiction terminates once the convening authority has acted on the case (*i.e.*, approving or modifying the court-martial's findings and sentence). See 10 U.S.C. 860; R.C.M. 1102(d); see also William Winthrop, *Military Law and Precedents* 49-50 (2d ed. 1920) ("As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its pur-

pose is accomplished, the court-martial, as compared with the civil tribunals, is transient in its duration.").

Second, the courts of criminal appeals, sitting in three-judge panels, have jurisdiction to review the judgment of a court-martial when the sentence, as approved by the convening authority, extends to death, a punitive discharge, or confinement for one year or more. See 10 U.S.C. 866(b). A court of criminal appeals may affirm the findings and sentence only to the extent they are correct in law and fact based on the record. 10 U.S.C. 866(c). "In considering the record, [a court of criminal appeals] may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Ibid.* Each of the armed forces possesses a court of criminal appeals. See 10 U.S.C. 866(a).

Third, the CAAF, composed of five civilian judges, has jurisdiction to review the record in all cases reviewed by the courts of criminal appeals. See 10 U.S.C. 867(a); 10 U.S.C. 941 *et seq.* The CAAF's review is limited to matters of law. 10 U.S.C. 867(c). Decisions of the CAAF are subject to this Court's review by writ of certiorari as provided in 28 U.S.C. 1259. See 10 U.S.C. 867a.

Under the "final judgment" rule of UCMJ Article 71(c)(1), 10 U.S.C. 871(c)(1), "[a] judgment as to legality of the proceedings is final" when direct review is completed by a court of criminal appeals and by the CAAF (if timely sought), and when the time for filing a petition for a writ of certiorari has expired. Final judgment marks the end-point of appellate review, and only then may the Executive fully execute the sentence and discharge a service member from the armed forces. *Ibid.*

At that point, under the distinct "finality" rule of UCMJ Article 76, 10 U.S.C. 876, the findings and sentence, as affirmed by the military appellate courts, and any discharge carried into execution, become "final and conclusive." All military orders publishing the proceedings of courts-martial, and all action taken pursuant to those proceedings, becomes "binding upon all departments, courts, agencies, and officers of the United States, subject only to" three specified exceptions: a petition for a new trial under UCMJ Article 73, 10 U.S.C. 873; action by the relevant service Secretary under UCMJ Article 74, 10 U.S.C. 874; and the President's authority.

Although the UCMJ defines the jurisdiction of the military courts, final judgments from the military justice system are subject to collateral review by Article III courts in a variety of contexts. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 750-753 (1975); Pet. App. 6a-7a.

2. Respondent, a native and citizen of Nigeria, came to the United States in 1984 and enlisted in the Navy in 1989. In 1998, military authorities charged him with conspiracy, larceny, and forgery based on his participation in a scheme to defraud a community college of over $28,000. Represented by both a military and a civilian attorney, respondent entered into a pretrial agreement with the convening authority. In exchange for respondent's plea of guilty, the convening authority agreed to reduce the charges and to refer the case to a special court-martial, which at the time could not impose a sen-

tence of confinement exceeding six months. Pet. App. 3a, 65a.[1]

After conducting an inquiry to determine that respondent's plea was knowing and voluntary, the military judge accepted the plea and convicted respondent of conspiracy and larceny. Respondent was sentenced to three months of confinement, a bad-conduct discharge, and reduction to the lowest enlisted pay grade. Pet. App. 3a-4a. The convening authority approved the sentence, and the N-MCCA affirmed. *Id.* at 64a-67a. Respondent did not seek further review, and he was discharged from the Navy on May 30, 2000. *Id.* at 4a.

In 2006, the Department of Homeland Security initiated removal proceedings against respondent based upon his court-martial conviction. After removal proceedings began, respondent petitioned the N-MCCA for a writ of error coram nobis to review his conviction. He alleged that he had received ineffective assistance of counsel because, he said, his civilian attorney had assured him that pleading guilty would eliminate any risk of deportation. Pet. App. 4a-5a. The N-MCCA (in a summary decision) determined that it had jurisdiction to consider respondent's petition but denied relief on the merits. *Id.* at 62a-63a.

3. The CAAF, by a 3-2 vote, affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-60a.

a. The CAAF held that the issuance of a writ of error coram nobis in the military system was authorized by the All Writs Act, 28 U.S.C. 1651(a), which allows

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[1] If respondent had been convicted by a general court-martial of any of those charges, it appears that he would have been subject to confinement for up to five years for each count. See *Manual for Courts-Martial, United States-1998*, at A12-1 to A12-4.

courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Ibid.*; Pet. App. 7a-21a.

The CAAF first considered whether the requested writ was "in aid of" the N-MCCA's jurisdiction. It determined that because the petition concerned "the validity and integrity of the judgment rendered and affirmed" by the N-MCCA, it was "in aid of" that court's jurisdiction. *Id.* at 8a-9a. The court acknowledged that in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), this Court held that the CAAF "is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." Pet. App. 7a (quoting *Goldsmith*, 526 U.S. at 536). But the court believed that *Goldsmith* was inapplicable here, reasoning that whenever a petition seeks "collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court-martial, a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." *Id.* at 8a. The court acknowledged that UCMJ Article 76, 10 U.S.C. 876, provides that a court-martial decision after direct review is "final and conclusive," but it interpreted *Councilman*, 420 U.S. at 745, to hold that Article 76 "provides a prudential constraint on collateral review, not a jurisdictional limitation." Pet. App. 9a.

The CAAF next considered whether relief under the All Writs Act was "necessary or appropriate." Pet. App. 11a-21a. It stated that "[a]n Article III court, when asked to consider a court-martial conviction on an issue that has not been fully and fairly reviewed within the military justice system and has not been defaulted pro-

cedurally, is likely to defer action pending review by the court that approved the conviction." *Id.* at 20a. That is because, the court reasoned, "the primary responsibility for addressing challenges to courts-martial resides with the courts in the military justice system established by Congress." *Ibid.* Accordingly, the court concluded that "the Court of Criminal Appeals provides an appropriate forum for coram nobis review." *Ibid.*

Turning to the facts of this case, the CAAF determined that respondent's claim of ineffective assistance of counsel met "the threshold criteria for coram nobis review." Pet. App. 24a. It therefore remanded the case to the N-MCCA to "determine whether the merits of [respondent's] petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required." *Id.* at 32a.

b. Judge Stucky dissented. Pet. App. 32a-39a. He believed that the court's "authority to grant the requested relief" was "questionable," but he found it unnecessary to reach that issue because, in his view, respondent's claim of ineffective assistance failed on the merits. *Id.* at 35a.

c. Judge Ryan dissented. Pet. App. 40a-60a. She started with the understanding that the CAAF, "as a legislatively created Article I court, is a court of limited jurisdiction" whose "limited powers are defined entirely by statute." *Id.* at 43a. Drawing from this Court's decision in *Goldsmith*, she observed that "the express terms of the [All Writs] Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Id.* at 43a (brackets in original) (quoting *Goldsmith*, 526 U.S. at 534-535).

In Judge Ryan's view, the military courts lacked statutory jurisdiction to consider respondent's petition because respondent is a civilian who no longer has any relationship with the military. Under UCMJ Articles 2 and 3, 10 U.S.C. 802, 803, she explained, "the military justice system does not have jurisdiction over civilians." Pet. App. 44a. Judge Ryan concluded that respondent, as "a *former* servicemember lawfully discharged from military service," has "no legally cognizable relationship with the military justice system." *Id.* at 45a. And, she explained, "[i]t is contrary to the limited nature of a legislatively created Article I court to exercise jurisdiction over a person not specifically prescribed by statute." *Ibid.*

In addition, Judge Ryan reasoned that the UCMJ precludes post-finality collateral review. Pet. App. 46a-48a. Articles 66 and 67, 10 U.S.C. 866, 867, which provide for direct, record-based review of court-martial cases, make "no mention of, and thus no provision for, post-finality collateral review." Pet. App. 48a. To the contrary, she explained, under Article 76, 10 U.S.C. 876, "once appellate review is complete, the findings and sentence are 'final and conclusive'" with "[n]o exception * * * for writs of coram nobis or other collateral review." Pet. App. 50a. Although Article 76 "describe[s] the terminal point for proceedings within the court-martial system," *id.* at 51a (brackets in original) (quoting *Councilman*, 420 U.S. at 750), Judge Ryan observed that it does not deprive Article III courts of authority to review court-martial convictions. *Ibid.* Thus, she concluded, the appropriate forum for any collateral review in a case such as this is an Article III court. *Ibid.*

SUMMARY OF ARGUMENT

The Article I military appellate courts lack jurisdiction to hear a coram nobis challenge, because neither the UCMJ nor the All Writs Act confers such jurisdiction. The All Writs Act requires both that the writ be "in aid of" the court's existing jurisdiction and that it be "necessary or appropriate." 28 U.S.C. 1651(a). Neither condition is satisfied here.

A. In *Clinton* v. *Goldsmith*, 526 U.S. 529, 534-535 (1999), this Court reaffirmed that the All Writs Act is not an independent jurisdictional grant: it confers authority to issue "process 'in aid of' the issuing court's jurisdiction," but it "does not enlarge that jurisdiction." In holding that the military appellate courts had authority to adjudicate respondent's post-finality coram nobis challenge, the CAAF repeated its mistake from *Goldsmith*, where, this Court held, the CAAF had erroneously asserted "continuing jurisdiction" over any judgment that it "at one time had the power to review." *Id.* at 536.

The UCMJ does not vest Article I military courts with open-ended jurisdiction to hear collateral challenges to the merits of final court-martial judgments. Articles 66 and 67 provide a framework only for direct, record-based review of a specified subset of court-martial cases. 10 U.S.C. 866, 867. And Articles 71(c) and 76 prohibit the type of collateral review sought by respondent. Those provisions render the findings and sentence of courts-martial, as affirmed by the military appellate courts and carried into execution, "final and conclusive" and "binding"—subject only to three exceptions, which are inapplicable here. 10 U.S.C. 876. The legislative history confirms that Congress intended Article 73's new-trial procedure (one of the exceptions specified in

Article 76) to supplant the writ of error coram nobis and thereby serve as the exclusive source for post-finality judicial review within the military justice system. The CAAF's contrary decision eviscerates Congress's carefully crafted limits on review of court-martial judgments.

The military courts also lack jurisdiction because respondent is a former service member no longer subject to the UCMJ. In *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955), this Court rejected on constitutional grounds the extension of Article I court-martial jurisdiction to a former service member "who had severed all relationship with the military." Accordingly, neither the UCMJ nor the military courts govern persons who have been punitively discharged (subject to limited exceptions inapplicable here). 10 U.S.C. 802, 803.

B. Coram nobis review of the merits of a final court-martial conviction also is neither "necessary" nor "appropriate," as required by the All Writs Act. Alternative remedies are available to former service members seeking to challenge a court-martial conviction. The military justice system itself provides several means of review, including pre-finality review by the convening authority and by the courts of criminal appeals and the CAAF as well as post-finality review under Article 73 (new-trial provision). Beyond that, former service members may bring collateral attacks in Article III courts via a habeas petition or a suit for declaratory judgment or mandamus relief, as well as in the Court of Federal Claims via a backpay action under the Tucker Act. See *Goldsmith*, 526 U.S. at 537-539.

The military appellate courts' exercise of coram nobis jurisdiction here is also inappropriate. Coram nobis

permits a court to correct its *own* errors, not those of an inferior court. Because the court-martial dissolves after rendering a conviction, no proper forum in the military justice system exists that can issue the writ. Moreover, the writ is fundamentally incompatible with the carefully designed system of military justice that Congress installed to further good order and discipline in the nation's armed forces. Given the writ's unsettled scope and lack of time limits, it would have the effect of diverting the military justice system's limited resources from its intended role—as demonstrated by the potential need for an evidentiary hearing in this case (under the CAAF's decision) to resolve respondent's claim of ineffective assistance of counsel from a decade ago.

ARGUMENT

THE MILITARY APPELLATE COURTS LACK JURISDICTION TO ADJUDICATE A FORMER SERVICE MEMBER'S CORAM NOBIS CHALLENGE TO THE MERITS OF HIS FINAL COURT-MARTIAL CONVICTION

The question presented is whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis filed by a former service member to review a court-martial conviction that has become final under the UCMJ. Because the UCMJ itself does not provide for any such jurisdiction, the CAAF premised its authority on the All Writs Act, 28 U.S.C. 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a); see Pet. App. 8a. The CAAF's decision contravenes this Court's decision in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), key provi-

sions of the UCMJ defining the jurisdiction of military appellate courts, and established principles governing the limited jurisdiction of Article I courts.

A. Coram Nobis Review Of A Final Court-Martial Judgment Is Not "In Aid Of" The Jurisdiction Of A Military Appellate Court

Because the All Writs Act does not itself provide a source of jurisdiction, it cannot support a coram nobis petition in the military courts unless the writ would "aid" an existing basis of jurisdiction. Here, that requirement cannot be met for two independent reasons: first, because the UCMJ provides no basis for such continuing jurisdiction; and, second, because former service not connected to the armed forces are no longer subject to the UCMJ and the military justice system.

1. Goldsmith *makes clear that the All Writs Act does not provide an independent basis of military-court jurisdiction to review court-martial judgments*

In *Goldsmith*, this Court reaffirmed that the All Writs Act is not an independent jurisdictional grant. As the Court explained, the All Writs Act confers authority to issue "process 'in aid of' the issuing court's jurisdiction," but it "does not enlarge that jurisdiction." 526 U.S. at 534-535 (quoting 28 U.S.C. 1651(a)); see, *e.g.*, *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 33 (2002) ("the All Writs Act does not confer jurisdiction on the federal courts"); see also 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3932, at 470 (2d ed. 1996) ("The All Writs Act * * * is not an independent grant of appellate jurisdiction."); 19 James Wm. Moore et al., *Moore's Federal Practice* § 204.02[4] (3d ed. 2008) (*Moore's Federal Practice*) ("The All Writs Act does not enlarge a court's jurisdiction.").

In *Goldsmith*, a service member was convicted by a general court-martial and sentenced to six years confinement. 526 U.S. at 531. The court of criminal appeals affirmed the conviction and sentence, which became final upon the service member's failure to seek CAAF review. *Id.* at 532. Although the final judgment did not include dismissal from the service, the President later dropped the service member from the rolls of the Air Force through a separate administrative process. *Ibid.* The service member then petitioned the CAAF for extraordinary relief under the All Writs Act, claiming, *inter alia*, that the President's action violated the Constitution. *Id.* at 532-533. The CAAF granted the petition and enjoined the President from dropping him from the service rolls. *Id.* at 533.

This Court reversed. Although the Court acknowledged that military appellate courts are among those empowered to issue extraordinary writs under the All Writs Act, it made clear that the power to do so depended on their existing statutory jurisdiction. See *Goldsmith*, 526 U.S. at 535. The Court reasoned that, because the CAAF no longer possessed jurisdiction under the UCMJ to review the service member's conviction and sentence, it also lacked authority to grant relief under the All Writs Act. *Ibid.* The Court expressly rejected the broad argument that, because the military appellate courts once had jurisdiction over the conviction and sentence, the Act provided a basis for continuing jurisdiction:

> [T]he CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice or to act as a plenary administrator even of criminal judgments it has affirmed. Simply stated, there is no source of continu-

> ing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review.

Id. at 536. Accordingly, the Court explained, "the CAAF spoke too expansively when it held itself to be 'empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in [the CAAF] after review in the intermediate court.'" *Id.* at 536-537 (brackets in original) (quoting *Goldsmith* v. *Clinton*, 48 M.J. 84, 87 (C.A.A.F. 1998)).

The CAAF in this case repeated its mistake, holding broadly that "when a petitioner seeks collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court-martial, a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." Pet. App. 8a. The Court in *Goldsmith*, however, rejected that very contention, *i.e.*, that the All Writs Act affords the military appellate courts carte blanche jurisdiction to "oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." *Goldsmith*, 526 U.S. at 536. Although this case involves a judgment that was reviewed on direct appeal by the court of criminal appeals and could have been reviewed by the CAAF at that time, "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Ibid.*

This Court's holding in *Goldsmith* is equally applicable in this case. Because the military courts have no existing jurisdiction under the UCMJ to review a collat-

eral challenge to the merits of a final court-martial conviction, the All Writs Act cannot serve as a bootstrap to confer that jurisdiction.

2. *Military courts lack jurisdiction under the UCMJ to hear coram nobis challenges to the merits of final court-martial judgments*

As with all courts established by Congress under Article I of the Constitution, the jurisdiction of military appellate courts is strictly limited to the bases of jurisdiction expressly conferred upon them by statute. See *Goldsmith*, 526 U.S. at 533-534.[2] Nothing in the statutory charter of either the CAAF or the courts of criminal appeals vests them with open-ended jurisdiction to hear collateral challenges to the merits of final court-martial judgments. Instead, as the legislative history confirms, Congress intended the UCMJ's new-trial procedure to serve as the exclusive source for such review within the military justice system. The CAAF erred in substituting its own expansive notions of jurisdiction for the statutory limits on military-court jurisdiction established by Congress.

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[2] See also, *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 908-909 n.46 (1988) ("The Court of Claims is a court of limited jurisdiction, because its jurisdiction is statutorily granted and it is to be strictly construed.") (quoting *Delaware Div. of Health & Soc. Servs.* v. *United States Dep't of HHS*, 665 F. Supp. 1104, 1117-1118 (D. Del. 1987)); *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) ("The Tax Court is a court of limited jurisdiction and lacks general equitable powers."); *In re United Missouri Bank of Kan. City, N.A.*, 901 F.2d 1449, 1451-1452 (8th Cir. 1990) ("Article I courts are courts of special jurisdiction created by Congress that cannot be given the plenary powers of Article III courts. The authority of the Article I court is not only circumscribed by the constitution, but limited as well by the powers given to it by Congress.") (internal citation omitted).

a. The plain text of the UCMJ forecloses post-finality review in military courts

As this Court explained in *Goldsmith*, "the CAAF's independent statutory jurisdiction is narrowly circumscribed." 526 U.S. at 535. Specifically, Article 67 of the UCMJ authorizes the CAAF to "review the record" in certain categories of court-martial judgments reviewed by the intermediate courts of criminal appeals. 10 U.S.C. 867(a). That review is further limited to "matters of law." 10 U.S.C. 867(c). As described by this Court, Congress has "confined the [CAAF's] jurisdiction to the review of specified sentences imposed by courts-martial" and has granted it "the power to act 'only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *Goldsmith*, 526 U.S. at 534 (second set of brackets in original) (quoting 10 U.S.C. 867(c)).

In turn, Article 66 authorizes the courts of criminal appeals to "review[] court-martial cases" referred to it by the Judge Advocate General and in which the sentence, as approved, includes death, bad-conduct discharge, or confinement for at least one year. 10 U.S.C. 866(a) and (b). That review is confined to the findings and sentence as approved by the convening authority, based on the record from the court-martial. 10 U.S.C. 866(c).

Accordingly, Articles 66 and 67 create a framework for direct, record-based review of court-martial judgments in the military appellate courts. But, as Judge Ryan observed (Pet. App. 46a-47a), nothing in those articles confers jurisdiction upon either the CAAF or the courts of criminal appeals to entertain collateral attacks on the merits of final court-martial judgments (let alone

based on extra-record material). See, *e.g.*, *Witham* v. *United States*, 355 F.3d 501, 505 (6th Cir. 2004) ("[N]either the Uniform Code of Military Justice nor the Manual for Courts-Martial provides for collateral review within the military courts.").

To the contrary, the plain language of UCMJ's finality provisions affirmatively prohibit the type of collateral review sought by respondent. Under Article 71(c), a "judgment as to the legality of the [court martial] proceeding is final * * * when review is completed by a Court of Criminal Appeals" and by the CAAF (if timely sought) and when the time for seeking certiorari has expired. 10 U.S.C. 871(c)(1). Under that "final judgment" rule, appellate review is complete and any discharge may be executed; after final judgment, the UCMJ provides for no further review. Article 76 provides an additional, uniquely military type of finality once military orders have been issued to implement the court-martial judgment:

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in

> section 874 of this title (article 74) and the authority of the President.

10 U.S.C. 876.

Finality thus accrues under Article 76 when a military authority executes the punitive discharge—subject only to the three explicitly enumerated exceptions. Of those three exceptions, only Article 73—by way of a petition for a new trial—provides a mechanism for collateral judicial review of court-martial judgments carried into execution. A petition for new trial, however, must be filed with the Judge Advocate General within two years of approval by the convening authority. Moreover, this "special post-conviction remedy," *Burns* v. *Wilson*, 346 U.S. 137, 141 (1953), is vested in the Judge Advocates General, and the military appellate courts play no role in considering an Article 73 petition unless the underlying case is pending before the CAAF or a court of criminal appeals at that time. 10 U.S.C. 873.

The CAAF's assertion of jurisdiction in this case under the aegis of the All Writs Act is tantamount to the addition of a fourth—and potentially much broader—exception to Article 76 finality. That result conflicts with this Court's instruction that "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *Pennsylvania Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 43 (1985)); cf. *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007) ("[A] precisely drawn, detailed statute pre-empts more general remedies.") (quoting *Brown* v. *GSA*, 425 U.S. 820, 834 (1976)). As Judge Ryan observed (Pet. App. 54a), the CAAF's exercise of coram nobis jurisdiction circumvents the statutory scheme established by

Congress, eviscerating Article 76's finality rule as well as Article 73's strict temporal limits. The potential implications of that circumvention are especially stark where, as here, the grant of relief might require a new order by a military appellate court, contravening the long-final military executive order fully executing the court-martial's findings and sentence, to undo an eight-year-old discharge—precisely the type of order that Article 76 precludes on its face.

The CAAF sought to justify its decision to disregard Article 76's limitation on post-finality review by labeling it "prudential." Pet. App. 9a. Specifically, the CAAF relied on *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), for the proposition that Article 76 is merely a "prudential constraint" and not a "jurisdictional limitation." Pet. App. 9a; see Br. in Opp. 8 (noting that "*Councilman* * * * stands for the proposition that Article 76 is a prudential restraint and not a jurisdictional one"). That reliance is misplaced.

In *Councilman*, the Court rejected an argument that Article 76 barred Article III courts from issuing writs of habeas corpus to review court-martial convictions. The Court noted that Article 76 "does not expressly effect any change in the subject-matter jurisdiction of Art. III courts." 420 U.S. at 749. But that observation about the jurisdiction of *Article III* courts has no bearing on the jurisdiction of *military* (*i.e.*, Article I) courts. To the contrary, *Councilman* recognized that "the finality clause" of the predecessor to Article 76 "describ[es] the terminal point for proceedings *within the court-martial system*." 420 U.S. at 750 (quoting *Gusik* v. *Schilder*, 340 U.S. 128, 132 (1950)) (emphasis added). Indeed, even the CAAF itself previously had recognized as much. See *Loving* v. *United States*, 62 M.J. 235, 240 (C.A.A.F.

2005) ("As finality under Article 76 is the terminal point for proceedings within the court-martial and military justice system, this Court's jurisdiction continues until a case is final."). Because the CAAF and N-MCCA are part of the "court-martial system," Article 76 is not merely a "prudential constraint" (Pet. App. 9a) but "a statutory directive" (*id.* at 51a) that forecloses their continued exercise of jurisdiction.[3]

The CAAF emphasized that *Councilman* cited *United States* v. *Frischholz*, 36 C.M.R. 306 (C.M.A. 1966), a case in which the former Court of Military Appeals—the predecessor of the CAAF—held that it had authority under the All Writs Act to hear a coram nobis petition challenging a final court-martial conviction. Pet. App. 10a. But this Court has never sanctioned the former Court of Military Appeals' decision in *Frischholz*. Instead, *Councilman*—a case about *Article III* jurisdiction—cited *Frischholz* only for the more limited proposition that Article 76 "does not insulate a conviction from subsequent attack in an appropriate forum." 420 U.S. at 753 n.26 (quoting *Frischholz*, 36 C.M.R. at 307). This Court had no occasion to consider *Frischholz*'s broader holding that the Court of Military Appeals was "an appropriate forum" for the issuance of writs of error coram nobis under the circumstances of that case or any other.

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[3] Respondent asserts (Br. in Opp. 8) that, if the Court of Federal Claims (an Article I court) can review a court-martial conviction notwithstanding Article 76, it "is difficult to see why" the N-MCCA and the CAAF cannot do so as well. But, as noted above, the finality clause of Article 76 establishes "the terminal point for proceedings *within the court-martial system*." *Gusik*, 340 U.S. at 132 (emphasis added). Unlike the N-MCCA and the CAAF, the Court of Federal Claims is not part of the military justice system. Consequently, Article 76 is not a jurisdictional bar to the Court of Federal Claims' review of court-martial convictions.

That holding, in any event, is suspect for essentially the same reasons as the CAAF's decision below.

b. Longstanding military-law authorities and the UCMJ's legislative history confirm the unavailability of coram nobis review in military courts

The CAAF's expansive exercise of jurisdiction not only contravenes the plain language of the relevant UCMJ provisions but also departs from the positions long adopted by both the Executive and Congress as to the highly circumscribed role of the military courts in affording post-finality relief from a court-martial conviction. The UCMJ, enacted against that backdrop, was designed to foreclose the very type of military-court jurisdiction that the CAAF asserts here.

Dating back to the 1800s, the Attorney General has recognized the final nature of court-martial judgments (at least within the military justice system) once approved by the reviewing authority. See *Relief of Fitz John Porter*, 18 Op. Att'y Gen. 18, 21 (1884) ("[W]here the sentence of a legally constituted court-martial, in a case within its jurisdiction, has been approved by the reviewing authority and carried into execution, it can not afterwards be reviewed and set aside" and "the proceedings are then at an end—the action thus had upon the sentence being, in contemplation of the law, *final*."); *Courts Martial—Lieutenant Devlin*, 6 Op. Att'y Gen. 369, 370 (1854) (holding that a court-martial sentence, "passed upon by the competent authority, from whose decision the law has provided no appeal" cannot "be rescinded, annulled, or modified").

In 1886, Colonel Winthrop similarly explained in his oft-cited treatise:

> [T]he judgment of a court-martial of the United States is, within its scope, absolutely final and conclusive. Its sentence, if *per se* legal, cannot, after it has received necessary official approval, be revoked or set aside; and it is only by the exercise of the pardoning power that it can * * * be rendered in whole or in part inoperative.

William Winthrop, *Military Law and Precedents* 54 (2d ed. 1920) (footnotes omitted) (reprint of 1886 treatise).

The statutory precursors to the UCMJ also reflect the historical narrowness of post-finality review within the military justice system. In 1920, an amendment to the pre-UCMJ Articles of War (which governed the Army) required the Judge Advocate General to establish a board of review to examine the record in any case in which the sentence required Presidential approval; authorized the Judge Advocate General to vacate convictions at the recommendation of the board; and gave the President the ultimate authority to "approve, disapprove, or vacate, in whole or in part, any findings of guilty, or confirm mitigate, commute, remit, or vacate any sentence, in whole or in part." Act of June 4, 1920, ch. 227, Art. 50½, 41 Stat. 797-799. At the same time, the amendment codified the longstanding principle of the finality of a court-martial conviction once it has been approved and ordered into execution: "the President's necessary orders to this end shall be binding upon all departments and officers of the Government." *Ibid.*

In 1948, the Elston Act (Act of June 24, 1948, ch. 625, 62 Stat. 604) further amended the Articles of War to afford members of the Army convicted by a court-martial more robust appellate remedies. See § 226, 62 Stat. 635, 638 (codified as Article of War 50, 10 U.S.C.

1521 (Supp. III 1949)). At the same time, the Act provided that "the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War * * * shall be final and conclusive, and orders publishing the proceedings of courts-martial * * * shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53." § 226, 62 Stat. 637 (codified as Article of War 50(h), 10 U.S.C. 1521(h) (Supp. III 1949)). As the House Report accompanying the legislation explained, that amendment (subject to its limited new-trial exception) made "explicit the finality of sentences of [a] court martial." H.R. Rep. No. 1034, 80th Cong., 1st Sess. 12 (1947).[4] As referenced above, the Elston Act, for the first time, afforded convicted service members a limited source of post-finality relief within the military court system: it authorized the Judge Advocate General to grant petitions for a new trial "upon good cause shown" if filed within a year of final disposition of the case. § 230, 62 Stat. 639 (codified as Article of War 53, 10 U.S.C. 1525 (Supp. III 1949)).

When Congress enacted the UCMJ in 1950, it largely recodified in Article 76 the finality provision it had adopted two years earlier, subject to two additional ex-

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[4] See 2 *Sundry Legislation Affecting the Naval and Military Establishment: Hearings Before the House Comm. on Armed Services*, 80th Cong., 1st Sess. 2118 (1947) (statement of Brigadier General Hubert D. Hoover) (noting that the amendment codified the "well established" principle governing the finality of a court-martial judgment); see also *Manual for Courts-Martial, United States Army-1949*, at 8 ("Only a Federal court has jurisdiction on writ of habeas corpus to inquire whether a court-martial has jurisdiction of the person and the subject matter or whether it exceeded its powers.").

ceptions based on the authority of the Secretary and the President. Compare 10 U.S.C. 876, with Article of War 53, 10 U.S.C. 1525 (Supp. III 1949). The Senate Report accompanying the legislation explained that "[s]ubject only to a petition for a writ of habeas corpus in Federal court, [Article 76] provides for the finality of court-martial proceedings and judgments." S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949).

Congress also amended the right to petition for a new trial (now codified in Article 73). It permitted such petitions to be filed up to two years (instead of one) after approval of a court-martial sentence, but it confined the bases upon which relief could be granted to "newly discovered evidence or fraud on the court." 10 U.S.C. 873. During Congressional hearings on that amendment, a Department of Defense official explained that its purpose was to restrict such post-finality challenges to "very remote" instances involving extra-record matters that were not susceptible to review in the normal course of appellate review. *Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1211 (1949) (testimony of Felix Larkin, Assistant General Counsel, Department of Defense).

Of particular relevance here, the Defense Department official testified as follows before Congress on the relationship between Article 73's new-trial petition and the civil court remedy of writ of error coram nobis:

> It has been the practice of some civil courts * * *, after the conviction is [af]firmed where habeas corpus will not lie, that the court will permit a so-called writ of error coram nobis, which is an old English writ, which has been revived for just this particular kind of circumstance. *What we did was to combine*

> *what amounts to a writ of error coram nobis with the motion for a new trial on newly discovered evidence. We have provided for both of them and to our minds they are the only additional circumstances over and above the appeal that need a remedy.*

Ibid. (emphasis added). The legislative history thus confirms what is manifest from the text: Congress intended the limited inroad on finality made possible through a motion for a new trial to exhaust the opportunities for collateral challenges within the military system.[5]

In sum, the longstanding structure of military justice provided that, upon finality, a court-martial conviction is not subject to further merits review within the military justice system. The single limited exception to this principle, a new-trial petition under Article 73, was intended to supplant the writ of error coram nobis. The CAAF's decision resurrects that extraordinary remedy—without Congress's well considered limitations as

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[5] In 1983, Congress enacted the current version of Article 71(c) to clarify that "current law requir[es] completion of the legal review of the case prior to execution of a punitive discharge. This not only will protect the accused, it will also ensure that the government does not *terminate military jurisdiction until a legal review of the case is completed.*" *Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2d Sess. 32 (1982) (statement of William H. Taft IV, General Counsel of the Department of Defense) (emphasis added). The legislative history's implication is clear: once a punitive discharge is executed such that Article 76 finality attaches, all military-court jurisdiction ceases. To the extent any interstitial military-court jurisdiction exists during the period between Article 71 finality and Article 76 finality (see *Loving*, 62 M.J. at 240-246), Congress left no doubt that it terminates upon accrual of Article 76 finality (subject only to Article 73's express new-trial exception).

to timeliness and subject matter—and thereby asserts a freestanding power to entertain collateral challenges in the military justice system in a manner that Congress never sanctioned. This Court should not permit the CAAF to expand its own authority, in defiance of congressional limits.

c. This case is readily distinguishable from the limited circumstances in which the All Writs Act arguably may be invoked in aid of military-court jurisdiction

This Court suggested (in dicta) in *Noyd* v. *Bond*, 395 U.S. 683 (1969), that the precursor to the CAAF possessed the power to "issue an emergency writ of habeas corpus in cases * * * which may ultimately be reviewed by that court," *i.e.*, in cases like *Noyd* itself (where petitioner sought release via habeas pending direct appellate review of his court-martial conviction). *Id.* at 695 n.7. That limited proposition is fully consistent with the government's construction of the UCMJ and its finality provisions in this case. In cases like *Noyd*—unlike this one—relief under the All Writs Act could be "in aid of" the military court's future appellate jurisdiction. That analysis does not apply here, where the conviction has long since become final. Because this is not a case that "may ultimately be reviewed" by any military court, but rather one involving a post-finality challenge to the court-martial judgment, there is no ongoing or future jurisdiction under Articles 66 or 67 that a writ of error coram nobis could "aid." See *ibid.* ("A different question would, of course, arise in a case which

the Court of Military Appeals is not authorized to review under the governing statutes.").[6]

Likewise, in *Goldsmith*, the government acknowledged that the CAAF could take action to compel adherence to its own judgment in the event of a military authority's attempt to increase the punishment. 526 U.S. at 536. But that limited invocation of the All Writs Act is justified on the basis that courts—Article I and Article III alike—generally possess "inherent power to enforce [their own] judgments. Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete.'" *Peacock* v. *Thomas*, 516 U.S. 349, 356 (1996) (quoting *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1868)); see *Axiom Res. Mgmt. Inc.* v. *United States*, 80 Fed. Cl. 530, 539 (2008) (holding that the Court of Federal Claims—an Article I court—"has inherent power to order the parties to the litigation to act in a manner that will enforce its judgment") (quoting *Abbott Labs.* v. *Novopharm Ltd.*, 104 F.3d 1305, 1309 (Fed. Cir. 1997)). A petition *to compel adherence to* a final judgment bears no resemblance to the present petition for writ of error coram nobis seeking to *alter or overturn* that judgment. The former promotes a judgment's finality, while the latter undermines it. As the *Goldsmith* Court recognized, there is a clear distinction between enforcing a judgment, which is permissible, and overturning or otherwise "act[ing] as a plenary administrator * * * of criminal judgments," which is not. 526 U.S. at 536.

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[6] Although the Court in *Noyd* cited the Court of Military Appeals' decision in *Frischholz* (see p. 21, *supra*) in that same footnote (395 U.S. at 695 n.7), the Court did so only for its rejection of a *categorical* denial of the military courts' power to grant emergency writs—approving of that power only in the circumstance discussed in the text.

Nor does this case concern the availability of collateral review of a conviction for lack of jurisdiction. Even assuming *arguendo* that a military court would possess authority to hear such a challenge,[7] that situation is also readily distinguishable. The military courts' exercise of such authority is designed to ensure that they have not overstepped the jurisdictional boundaries enacted by Congress. Such review thus may further fidelity to the principle of an Article I court's limited jurisdiction, and in that limited respect can be characterized as "in aid of" defining the court's jurisdiction. As discussed, however, in this case there is no basis for concluding that entertaining respondent's coram nobis petition would be "in aid of" a military court's jurisdiction.

3. The military courts also lack jurisdiction over the petition for writ of error coram nobis because respondent is a former service member no longer subject to the UCMJ

The military appellate courts lack jurisdiction over respondent's petition for the independent reason that respondent is "a *former* servicemember lawfully discharged from military service pursuant to a court-martial conviction [who] has no current relationship with the military." Pet. App. 45a. As Judge Ryan observed, the CAAF's contrary decision on this point "flies in the face of Supreme Court precedent, the decisions of at least two federal circuit courts of appeal, and the position, for the past fifty-seven years, of the solicitors general of the United States as agents of the President, commander in

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[7] Although the CAAF has recognized such authority over the objection of the government in the military appellate courts (see, *e.g.*, *Del Prado* v. *United States*, 48 C.M.R. 748 (C.M.A. 1974)), this Court has not done so and need not reach the issue here.

chief of the armed forces." *Id.* at 40a; see *id.* at 40a-41a (collecting authorities).

The Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14. As this Court stated, that clause "authorizes Congress to subject persons actually in the armed service to trial by court-martial for military and naval offenses." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955) (holding that Congress could not subject a former service member to trial by court-martial even for crimes committed while a serviceman). But "[i]t has never been intimated by this Court * * * that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions." *Ibid.* The Court explained that "[t]o allow this extension of military authority would require an extremely broad construction of the language," whereas "its natural meaning * * * would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *Id.* at 14-15; see Winthrop, *supra*, at 89 ("It is the *general rule* that the person is amenable to the military jurisdiction only during the period of his service as an officer or soldier," and that jurisdiction "ends with * * * discharge or mustering out."); cf. *Solorio* v. *United States*, 483 U.S. 435, 439 (1987) ("the proper exercise of court-martial jurisdiction over an offense [depends] on one factor: the military status of the accused").

Consistent with that constitutional limitation, the UCMJ does not apply to persons who have been punitively discharged from the armed forces, subject to lim-

ited exceptions inapplicable here.[8] Because the CAAF and the criminal courts of appeals form part of the military justice system, their jurisdiction cannot extend to discharged service members whose convictions are final and who have no remaining connection to the military. Their jurisdiction therefore does not extend to respondent, who, on the day he was discharged from the Navy in 2000, became "a civilian, completely detached from the military and the military justice system." Pet. App. 45a (Ryan, J., dissenting). Indeed, the CAAF's contrary assertion trenches upon the President's authority as commander-in-chief (U.S. Const. Art. II, § 2)—as well as Congress's delegated authority in Articles 71 and 76 (see pp. 18-20, *supra*)—by disregarding executive military orders that terminated respondent's relationship with the armed forces and their courts.

Respondent claims (Br. in Opp. 12-13) that the government's argument here "conflates personal jurisdiction and appellate subject matter jurisdiction" and that, if correct, it would mean that Article III courts and the Court of Federal Claims (in a backpay action) would lack jurisdiction to adjudicate claims arising from court-mar-

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[8] The exceptions cover persons who are in custody of the armed forces serving a sentence imposed by a court-martial, see 10 U.S.C. 802(a)(7), and, in certain cases, deserters and persons who procured their discharge by fraud, see 10 U.S.C. 803(b) and (c). The CAAF also has held that discharge from the armed forces during the pendency of a direct appeal does not divest it of jurisdiction, based upon the principle that "once court-martial jurisdiction attaches, it continues until the appellate processes are completed." *United States* v. *Woods*, 26 M.J. 372, 373 (C.M.A. 1988) (internal quotation marks omitted); see, *e.g.*, *United States* v. *Davis*, 63 M.J. 171, 176 (C.A.A.F. 2006). Because the appellate process in this case was completed years ago, that principle provides no basis for the military appellate courts' assertion of jurisdiction here.

tial convictions. But this Court's decision in *Toth* is not predicated solely on notions of personal jurisdiction; instead, it speaks more broadly to the constitutionally permissible scope of military-court jurisdiction over cases involving non-service members. And, unlike that of the military appellate courts, the subject-matter jurisdiction of Article III courts and the Court of Federal Claims is not confined to cases involving persons subject to the UCMJ. Rather, they possess jurisdiction to entertain the claims of anyone, including former members of the armed forces, as long as such claims otherwise fall within their statutory and constitutional authority.

B. Coram Nobis Review Of The Merits Of A Final Court-Martial Judgment Is Neither Necessary Nor Appropriate

Even if a military appellate court had some jurisdictional basis for collaterally reviewing the merits of a final court-martial judgment, the court would still lack authority under the All Writs Act to issue the writ of error coram nobis in this case because it is neither "necessary" nor "appropriate." 28 U.S.C. 1651(a). As this Court has observed, "it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (brackets in original) (quoting *United States* v. *Smith*, 331 U.S. 469, 476 n.4 (1947)). That observation applies with even greater force in the military context. First, the availability of alternative remedies for former service members seeking to challenge their court-martial convictions makes coram nobis unnecessary. Second, a military appellate court's review of a court-martial judgment long after the conviction has become final is inappropriate because it is inconsistent with the traditional

scope of the writ and incompatible with the demands of our system of military justice.

1. Adequate alternative remedies are available to convicted former service members

Even when jurisdiction may otherwise exist, the All Writs Act, this Court has held, "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Goldsmith*, 526 U.S. at 537; see 19 *Moore's Federal Practice* § 201.40 ("[A] writ may not be used * * * when another method of review will suffice."). That limitation applies here because, even without resort to coram nobis, a former service member has several avenues for challenging a court-martial conviction, including an Article III habeas petition.

As discussed above, the military justice system itself provides multiple means for review of a court-martial conviction. See *Goldsmith*, 526 U.S. at 537 n.11. Aside from plenary review by the convening authority and direct appellate review in the courts of criminal appeals and the CAAF (see pp. 3-4, *supra*), a convicted person can seek additional pre-finality review in certain circumstances (see p. 27, *supra*) and can petition post-finality for a new trial under Article 73 (see p. 19, *supra*). Even if they are outside the two-year window, a convicted service member may petition the military courts in certain circumstances, *i.e.*, to compel adherence to the final judgment or to challenge the court-martial's jurisdiction. See p. 28, *supra*.

Outside the military justice system, the most common avenue for collateral attack is habeas corpus review in an Article III court under 28 U.S.C. 2241. As the Court noted in *Goldsmith*, "once a criminal conviction

has been finally reviewed within the military system, and a servicemember in custody has exhausted other avenues provided under the UCMJ to seek relief from his conviction, * * * he is entitled to bring a habeas corpus petition" in federal court. 526 U.S. at 537 n.11 (citation omitted); see *Councilman*, 420 U.S. at 750; *Gusik*, 340 U.S. at 132-133.

Even in cases where the former service member is no longer in custody, there are sufficient alternative remedies to foreclose recourse to coram nobis relief. For example, federal courts have entertained collateral challenges to court-martial convictions under their general federal-question jurisdiction and under their authority to grant declaratory judgments or mandamus relief. See, *e.g.*, *United States ex rel. New* v. *Rumsfeld*, 448 F.3d 403, 406-407 (D.C. Cir. 2006) (finding federal-question jurisdiction under 28 U.S.C. 1331), cert. denied, 127 S. Ct. 2096 (2007); *Davis* v. *Marsh*, 876 F.2d 1446, 1448 & n.4 (9th Cir. 1989) (reviewing declaratory judgment action to void court-martial conviction); *Baker* v. *Schlesinger*, 523 F.2d 1031, 1034-1035 (6th Cir. 1975) (finding jurisdiction under 28 U.S.C. 1361 for mandamus action), cert. denied, 424 U.S. 972 (1976).

The CAAF justified its assertion of coram nobis jurisdiction on the theory that, even after a court-martial conviction has become final, Article III courts will abstain from adjudicating claims for collateral review pending exhaustion of available remedies within the military justice system. Pet. App. 16a-17a. But as Judge Ryan explained (*id.* at 58a-59a), an exhaustion rule cannot invest the military courts with collateral jurisdiction that they otherwise would lack. If the military appellate courts have no continuing jurisdiction in a case that is final under Article 76, then the lack of post-finality re-

view in those courts would not impede review by an Article III court (because there are no further military-court remedies to exhaust).

In addition, former service members who allege that their discharge was unlawful may collaterally challenge their court-martial convictions in an action for backpay in the Court of Federal Claims. See 28 U.S.C. 1491(a); *Goldsmith*, 526 U.S. at 539 (collecting cases); see also, *e.g.*, *Matias* v. *United States*, 923 F.2d 821, 823 (Fed. Cir. 1990) ("We have long honored the rule that 'judgments by courts-martial, although not subject to direct review by federal civil courts, may nevertheless be subject to narrow collateral attack [in the Court of Federal Claims] on constitutional grounds' when traditional Tucker Act jurisdiction is present.") (quoting *Bowling* v. *United States*, 713 F.2d 1558, 1560 (Fed. Cir. 1983)).

Respondent argues (Br. in Opp. 10) that the statutes of limitations that govern those alternative claims would preclude him from seeking relief now. But even if that were so, particular factual circumstances in any given case are not a basis for the CAAF to expand its jurisdiction to classes of cases that have become final and that, as a general rule, are subject to adequate alternative remedies. It is enough that respondent's "constitutional objections *could* have been addressed by the federal courts." *Goldsmith*, 526 U.S. at 539 n.12 (emphasis added); cf., *e.g.*, *Trenkler* v. *United States*, 536 F.3d 85, 99 (1st Cir. 2008) ("adequacy and effectiveness [of the remedy] must be judged ex ante" in determining whether Section 2255's savings clause applies), petition for cert. pending, No. 08-7947 (filed Dec. 22, 2008).

2. Coram nobis jurisdiction is also inappropriate in light of the writ's traditional scope as well as the burdens imposed on the military justice system

The military appellate courts' exercise of coram nobis jurisdiction here is also inappropriate.

a. The writ of error coram nobis permits a court to correct its *own* errors, not to correct those of an inferior court. As the Second Circuit has explained, "[t]he term '*coram nobis*' * * * comes from the phrase 'error *quae coram nobis resident*,' which means, literally, an error 'which remains in our presence.'" *Finkelstein* v. *Spitzer*, 455 F.3d 131, 133 (2006) (citations omitted), cert. denied, 549 U.S. 1169 (2007). The common-law writ thus "was used by a court in cases within its own jurisdiction, not to correct errors in other jurisdictions." *Ibid.*; see, *e.g.*, *United States* v. *Morgan*, 346 U.S. 502, 507 n.9 (1954) ("[I]f there be error in the *process*, or through the default of the *clerks*, it may be reversed in the same court, by writ of error *coram nobis*.") (quoting 2 William Tidd, *Practice of the Courts of King's Bench and Common Pleas* 1136 (4th Am. ed. 1856)); *Lowery* v. *McCaughtry*, 954 F.2d 422, 423 (7th Cir.) ("Coram nobis is an established writ, but the 'usages and principles of law' send an applicant to the court that issued the judgment.") (citations omitted), cert. denied, 506 U.S. 834 (1992); *Booker* v. *Arkansas*, 380 F.2d 240, 244 (8th Cir. 1967) ("Relief by the writ * * * is available, if at all, only in the court which rendered the judgment."); 19 *Moore's Federal Practice* § 204.05[5] (3d ed. 2008) ("The district courts have the power to issue writs of coram nobis to correct errors within their own jurisdiction under the All Writs Act.").

Neither the CAAF nor the N-MCCA was the court that rendered the judgment in this case: the judgment

was entered by a court-martial. Courts-martial are not standing bodies like Article III courts, but are convened to hear particular cases and then are dissolved. See pp. 3-4, *supra*; *Runkle* v. *United States*, 122 U.S. 543, 555-556 (1887) ("A court-martial * * * is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved."). Because courts-martial are "ad hoc proceedings which dissolve after the purpose for which they were convened has been resolved," they are incapable of considering petitions for collateral relief. *Witham*, 355 F.3d at 505; see *United States* v. *DuBay*, 37 C.M.R. 411, 413 n.2 (C.M.A. 1967); Pet. App. 53a n.8 ("Because we do not having standing [trial] courts, the military justice system appears ill-suited to [coram nobis] relief.").

The CAAF in this case acknowledged both indisputable points: that the writ of error coram nobis is available only from the court that rendered the judgment *and* that the trial court is not available. Pet. App. 17a-19a. It follows that no military court possesses the power to issue the writ. The CAAF's contrary conclusion (citing only the *direct* review provision of Article 66(c), *id.* at 19a) is fundamentally inconsistent with the common-law scope of the writ and therefore cannot give rise to an "appropriate" exercise of the authority granted by the All Writs Act.[9]

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[9] Respondent maintains (Br. in Opp. 10-11) that "the worst that can be said [concerning his motion for coram nobis relief] is that his petition should * * * have been labeled a petition for a writ of error coram *vobis*" and that the government's assertion that the CAAF was without jurisdiction to grant coram nobis relief therefore "exalt[s] nomenclature over substance" (internal quotation marks omitted). But such a writ would have been equally inappropriate here. A writ of error coram

b. The writ of error coram nobis is also fundamentally incompatible with a military justice system that emphasizes finality in order to instill discipline critical to the maintenance of a well-trained armed force without detracting from the military's primary mission. See 10 U.S.C. 871(c)(1), 876; *Toth*, 350 U.S. at 17 ("[T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.").

While courts have adopted certain common-law limits on the scope of the writ, the availability of coram nobis relief remains subject to unsettled and amorphous legal standards. As this Court has recognized, petitions for extraordinary relief such as a writ of error coram nobis generally are not subject to time limits. See *In re Sindram*, 498 U.S. 177, 180 (1991); Pet. App. 54a (Ryan, J., dissenting). In crafting the bounds of the petition for new trial within the military justice system, the proponents of Article 73 intended that remedy to serve as a substitute for coram nobis relief. See pp. 25-26, *supra*. In particular, Congress imposed a two-year time limit on the submission of such petitions to vindicate the strong interest in finality. 10 U.S.C. 873. The CAAF's decision, which permits petitions for coram nobis relief at any time, frustrates that important legislative objective.

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vobis is "directed by a reviewing court to the court which tried the cause." *Nicks* v. *United States*, 955 F.2d 161, 166 (2d Cir. 1992). In this case, the reason why the CAAF could not grant a writ of error coram vobis is identical to the reason why it could not entertain a writ of error coram nobis. Because courts-martial are not standing tribunals, and respondent's special court-martial was long ago dissolved, there is no tribunal to which such a writ could have been directed.

Additionally, the CAAF's decision has the practical effect of diverting the limited resources of the military justice system from its intended role of administering justice, fostering discipline, and maintaining readiness within the armed forces to that of factfinding on behalf of individuals who have long severed their ties with the military. The resolution of collateral challenges to court-martial convictions often may require evidentiary hearings. Resolution of respondent's ineffective assistance claim, for example, would necessitate factual findings concerning what advice respondent's civilian attorney provided him and whether respondent's decision to enter pleas of guilty were predicated upon such advice. Pet. App. 31a-32a. No provision of the UCMJ, however, prescribes procedures for litigating such factual issues long after convictions have become final and the court-martial has been dissolved. As a result, the CAAF has improvised "an unwieldy and imperfect system" for post-conviction factfinding by the assignment of the case to a court-martial convening authority with instructions to hold an evidentiary hearing. *Id.* at 47a (Ryan, J. dissenting) (citing *DuBay*, 37 C.M.R. at 413). That procedure requires a senior commander, members of his staff, a military judge, trial counsel, and military defense counsel—none of whom will have had prior involvement in the case—to divert their attention from their primary responsibilities to the resolution of factual issues that may involve events occurring years before.

Even in cases where post-conviction claims can be addressed without resorting to an evidentiary hearing, the government likely would be required not only to appoint counsel to represent its interests but also to appoint defense counsel at its expense to represent a now-civilian petitioner. See 10 U.S.C. 870(c)(2). As this

Court has noted, when petitioners "are not subject to the financial considerations," such as attorney's fees, "that deter other litigants from filing frivolous petitions," they have "a greater capacity than most to disrupt the fair allocation of judicial resources." *In re Sindram*, 498 U.S. at 180. And "[t]he risks of abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation." *Ibid.* For all of those reasons, the open-ended post-conviction remedy that the CAAF adopted in this case is singularly inappropriate in the military context.

CONCLUSION

The judgment of the CAAF should be reversed.

Respectfully submitted.

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APPENDIX

1. 10 U.S.C. 802 provides:

Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who—

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of—

(A) investigation under section 832 of this title (article 32);

(B) trial by court-martial; or

(C) nonjudicial punishment under section 815 of this title (article 15).

(2) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was—

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not—

(A) be sentenced to confinement; or

(B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

(e) The provisions of this section are subject to section 876b(d)(2) of this title (article 76b(d)(2)).

2. 10 U.S.C. 803 provides:

Art. 3. Jurisdiction to try certain personnel

(a) Subject to section 843 of this title (article 43), a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

(d) A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.

3. 10 U.S.C. 866 provides:

Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

4. 10 U.S.C. 867 provides:

Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed

Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

5. 10 U.S.C. 871 provides:

Art. 71. Execution of sentence; suspension of sentence

(a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.

(b) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and—

(A) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

(B) such a petition is rejected by the Court of Appeals for the Armed Forces; or

(C) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

(ii) such a petition is rejected by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(2) If a sentence extends to dismissal or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action on that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.

(d) The convening authority or other person acting on the case under section 860 of this title (article 60) may suspend the execution of any sentence or part thereof, except a death sentence.

6. 10 U.S.C. 873 provides:

Art. 73. Petition for a new trial

At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

7. 10 U.S.C. 876 provides:

Art. 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President.

8. 28 U.S.C. 1651 provides:

Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
FEB 6 - 2003
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No. 08-267

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner,*
v.
JACOB DENEDO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Under 28 U.S.C. § 1259(4)—the jurisdictional statute which the government has invoked—the Court may review "[c]ases . . . in which the Court of Appeals for the Armed Forces has granted relief." Does the Court have jurisdiction under that provision where the Court of Appeals remands to a lower court for further proceedings to "determine whether the requested relief should be granted"?

2. May the military appellate courts issue a writ of error coram nobis where the claim arises after a conviction has become final and no other remedy is available?

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BRIEF FOR THE RESPONDENT

JURISDICTION

The Court lacks jurisdiction. *See* pp. 6-13 *infra*.

GOVERNING STATUTES

The pertinent statutes are reproduced in the appendix to the government's brief.

STATEMENT OF THE CASE

Jacob Denedo, a Nigerian who came to the United States as a student and eventually became a permanent resident, enlisted in the United States Navy in 1989. After two reenlistments, he was convicted in 1998 by a special court-martial for larceny and conspiracy to commit larceny. He was sentenced to three months' confinement, reduction to the lowest enlisted pay grade, and a bad-conduct discharge. He had pleaded guilty in reliance on the explicit (and flatly incorrect) assurance of his civilian defense counsel, Michael A. Ceballos, that conviction by a special court-martial would not expose him to any risk of deportation because conviction by such a court—unlike conviction by a general court-martial—is a federal misdemeanor. The Navy-Marine Corps Court of Criminal Appeals ("the Navy Court") affirmed on February 24, 2000, and on May 30, 2000, Mr. Denedo was discharged.

Mr. Denedo applied for naturalization in 2002. The Immigration and Naturalization Service ("INS") denied his application without prejudice on the

ground that his conviction reflected a lack of good moral character during the statutorily-prescribed period. The INS again denied his application without prejudice when he reapplied the following year.

On October 30, 2006, after expiration of the latest possible date for seeking collateral review of his conviction in a district court or the Court of Federal Claims, 28 U.S.C. §§ 2401(a), 2501, the INS's successor agency (U.S. Citizenship and Immigration Services) did precisely what Mr. Ceballos assured Mr. Denedo the government could not do—it initiated removal proceedings based on the court-martial. The notice to appear treated the court-martial conviction as an "aggravated felony" under the Immigration and Nationality Act ("INA"). 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

In addition to having advised Mr. Denedo that conviction by a special court-martial would constitute a misdemeanor (and hence could not be used to deport him), Mr. Ceballos never informed him that the 1996 INA amendments had expanded the definition of "aggravated felony." Those amendments reduced the minimum term of imprisonment for theft offenses from "at least five years" to "at least one year" and reduced the minimum amount of loss in fraud cases under § 1101(a)(43)(M) from "$200,000" to "$10,000."[1] *See* Pub. L. No. 104-208, 110 Stat. 3009 (1996), *amending* 8 U.S.C. §§ 1101(a)(43)(G), (M). Having no independent knowledge of the term "aggravated felony" or the INA and its amendments, Mr. Denedo relied on Mr. Ceballos to inform him as

[1] The larceny to which Mr. Denedo pleaded guilty involved a loss in excess of $10,000.

to the state of the law and the consequences of his plea.

Upon receiving notice of the removal proceedings, Mr. Denedo secured other counsel and applied for a writ of error coram nobis from the Navy Court, seeking an order setting aside his plea. The Navy Court denied a government motion to dismiss for lack of jurisdiction, but, without explanation, denied relief on the merits. Pet. 63a.

Mr. Denedo filed a timely writ appeal with the Court of Appeals for the Armed Forces.[2] After receiving briefs, the court directed the parties to focus on jurisdiction and, assuming jurisdiction, "whether this Court is in a position to address the merits of the petition without further fact-finding." Hearing Notice, June 26, 2007. The government took the position that the Court of Appeals lacked jurisdiction and that Mr. Ceballos was not ineffective because his advice was correct. When questioned about the inconsistency between its position and that of the Department of Homeland Security ("DHS") in the removal proceeding, the government represented to the Court of Appeals that the United States had abandoned conviction of an aggravated felony as a basis for Mr. Denedo's removal. When DHS announced in the removal proceeding that it had not done so and had no intention of doing so, the government withdrew its claim that "the court-martial charges in this case did not constitute aggravated

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[2] A writ appeal is the procedure for seeking review of a decision of a service court of criminal appeals on petitions for extraordinary relief. C.A.A.F.R. 4(b)(2). The Court of Appeals encourages recourse to the service courts in the first instance. C.A.A.F.R. 4(b)(1), 10 U.S.C. § 944.

felonies for immigration law and deportation purposes." Gov't Motion for Leave to Withdraw Certain Arguments at 1 (Jan. 7, 2008).

The government never rebutted the facts set forth in Mr. Denedo's petition, and conceded that his assertions will be taken as accurate for the purpose of review by the Court of Appeals. Gov't Ans. at 2-3 (Apr. 9, 2007); *cf.* C.A.A.F.R. 28(b)(1) ("To the extent that the petitioner's statement of facts is not contested by the respondent, it shall be taken by the Court as representing an accurate declaration of the basis on which relief is sought").

The Court of Appeals held that it had jurisdiction, but rather than grant the relief Mr. Denedo sought, it remanded for further proceedings. Pet. 32a. "If prejudice is found," Chief Judge Effron wrote for the majority, "the [Navy C]ourt shall determine whether the requested relief should be granted." *Id.* Two judges dissented. Pet. 32a, 40a. Judge Stucky "consider[ed] it established that we have coram nobis jurisdiction in cases in which the jurisdiction of the court-martial is at issue," but found it unnecessary to decide the scope of that jurisdiction because, in his view, Mr. Denedo had not made out a claim for relief on the merits. Pet. 32a, 35a. Judge Ryan opined that the Court of Appeals had no jurisdiction and argued that since Mr. Denedo was no longer in the service he could not be retried if coram nobis were granted and his plea set aside. Pet. 40a, 43a-45a.

Without objection from DHS, the Immigration Court administratively closed the removal proceedings on October 17, 2008. Mr. Denedo remains sub-

ject to deportation. He has long since served his sentence.

Unbeknownst to Mr. Denedo, Mr. Ceballos had begun to suffer from the effects of alcohol abuse, including occupational impairment, and agreed to participate in an alcohol rehabilitation program. Even though he failed to stay sober, he continued to practice until May 2000, when he entered a conditional guilty plea in response to bar complaints. He admitted violating the Florida Rules of Professional Conduct by, among other things, failing to adequately advise clients. Later that year, he was suspended from practice for 30 days and placed on probation for two years with alcohol rehabilitation treatment. His parents had him involuntarily committed in November 2000 because his "extreme consumption of alcohol made him a danger to himself and others." In 2001, he was suspended on an interim basis, *Florida Bar v. Ceballos*, 786 So. 2d 1190 (Fla. 2001), and placed on inactive status. *Florida Bar v. Ceballos*, 791 So.2d 1102 (Fla. 2001). In 2002, he was indefinitely suspended. *Florida Bar v. Ceballos*, 832 So. 2d 106 (Fla. 2002). He received reciprocal discipline in other jurisdictions. *E.g., In re Ceballos*, 797 A.2d 1258 (D.C. 2002). Florida reinstated him on three years' probation shortly after the government sought certiorari. *Florida Bar v. Ceballos*, 992 So.2d 821, 2008 WL 4191941 (Fla. 2008). Mr. Denedo was unaware of either Mr. Ceballos's impairment or his unprofessional conduct until after the INS initiated removal proceedings.

The gravamen of Mr. Denedo's claim is that incorrect legal advice rendered his plea involuntary. Because he did not learn of Mr. Ceballos's blunder

until the six-year statutes of limitation for collateral review in the civilian federal courts had expired, he has never had a remedy other than a writ of error coram nobis from the appellate military courts.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction because the Court of Appeals did not "grant[] relief" as required by 28 U.S.C. § 1259(4). If the Court determines that it has jurisdiction, it should affirm because Mr. Denedo's petition meets the threshold requirements for a writ of error coram nobis and Article 76 of the UCMJ does not bar the appellate military courts from entertaining collateral attacks in cases that have become final.

ARGUMENT

I. The Court Lacks Jurisdiction

The government relies on § 1259(4) as the basis for this Court's jurisdiction. That provision authorizes the Court to review "[c]ases, other than those described in paragraphs (1), (2), and (3) of [§ 1259], in which the Court of Appeals for the Armed Forces has granted relief." This is not such a case because the Court of Appeals did not "grant[] relief." Section 1259(4) must be construed with particular precision and fidelity to its terms because it concerns review by this Court. *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 581 (1982). Doing so requires dismissal of the petition as improvidently granted.

"Each of [§ 1259's] four subdivisions makes clear that Supreme Court review is available if, but only if, the Court of Appeals for the Armed Forces decides a case on its merits, either on a mandatory or discretionary basis." EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 128 (9th ed. 2007). "Thus, the Court cannot grant certiorari to review a nonfinal judgment of the Armed Forces court, or an appeal from a lower military court judgment that has just been lodged in the Armed Forces court." *Id.* at 130. The judgment below is plainly nonfinal.

The government's brief (2) describes the decision below as having "affirmed in part, reversed in part, and remanded for an evidentiary hearing." The implication that the Court of Appeals "granted relief" within the meaning of § 1259(4) is unfounded because all it did was remand. It could not be clearer that the merits of Mr. Denedo's request to have his plea set aside remained to be adjudicated:

> [W]e remand Appellant's petition to the United States Navy-Marine Corps Court of Criminal Appeals for further proceedings, where the Government will have the opportunity to obtain affidavits from defense counsel and submit such other matter as the court deems pertinent. The Court of Criminal Appeals will then determine whether the merits of Appellant's petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required under *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). The court will determine

> whether Appellant's counsel rendered deficient performance and, if so, whether such deficiency prejudiced Appellant under *Strickland v. Washington*, 466 U.S. 668 (1984). *If prejudice is found, the court shall determine whether the requested relief should be granted.*

Pet. 32a (emphasis added).

A remand is not "relief" unless it provides something of substance from the standpoint of the moving party's underlying claim. It is merely a procedural step that may lead to a victory on the merits. "Relief" is the substance of what a moving party seeks and what the court finds he or she is entitled to. *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 706 (7th Cir. 1999) (Posner, C.J.); *cf., e.g., Sullivan v. Hudson*, 490 U.S. 877, 887 (1989) (claimant is not prevailing party under Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), until result of remand to agency is known); *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 791-93 (1989) (plaintiff must achieve some relief on merits of claim to be prevailing party under 42 U.S.C. § 1988); *Watson v. Southeastern Pennsylvania Transp. Auth.*, 207 F.3d 207, 224 (3d Cir. 2000) (reinstatement was "relief" for purpose of awarding fees because it was a benefit sought in suing); *Cady v. City of Chicago*, 43 F.3d 326, 328 (7th Cir. 1994) (outcome of civil rights suit is "relief" only if actual relief on merits materially affects behavior of defendant in way that directly benefits plaintiff). "A boxer thrown out of the ring and then allowed back in to continue the fight has not prevailed." *Akers v. Nicholson*, 409 F.3d 1356, 1360 (Fed. Cir. 2005).

"Relief" is a term of art whose meaning is derived from the context. The context of § 1259(4) is petitions for extraordinary relief in the nature of various prerogative writs, as opposed to the three more conventional ways by which a case can reach the Court of Appeals (mandatory review, certification by the Judge Advocate General, and petition for a grant of review). Setting aside a plea is quintessential coram nobis relief. *E.g.*, *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) (erroneous advice on immigration consequences of guilty plea); *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002) (same); *see generally* 39 Am. Jur. 2d *Habeas Corpus* § 271, at 423 (1999) ("If the triumphant coram nobis petitioner has served the sentence and is no longer incarcerated, the conviction is vacated and the petitioner's record of conviction expunged"). In the rare coram nobis case in which the Court of Appeals does grant relief, its order is unambiguous. *E.g.*, *Del Prado v. United States*, 23 U.S.C.M.A. 132, 48 C.M.R. 748, 750 (1974) (declaring conviction null and void, directing expungement and restoration of rights and privileges).

In its reply brief at the certiorari stage, the government argued (3), first, that remand is "a traditional and important form of relief for a party that lost in a lower court" and, second, that it was the only relief the Court of Appeals could have granted. *Lonchar v. Thomas*, 517 U.S. 314, 332 (1996), on which the government relied for the first point, does not define a remand as "relief," but merely recites that a new trial or resentencing is traditional habeas

relief. This is not a habeas case and, in any event, the Court of Appeals did not order a new trial.[3]

Nor is the government's second point well taken. In the Navy Court, it elected to move to dismiss on jurisdictional grounds, rather than attempting to rebut Mr. Denedo's evidence of ineffective assistance. Having first directed the parties to focus on whether further proceedings were needed before it addressed the merits, the Court of Appeals explained that "it would be inappropriate to render a judgment on the merits" because the lower court had not afforded the government an opportunity to obtain affidavits and submit any other matters that might have a bearing on the merits. Pet. 31a. The fact that this particular case unfolded as it did says nothing about the meaning of the term "relief" in § 1259(4). Had the Navy Court required the government to lay its evidentiary cards on the table and then denied Mr. Denedo's petition, there is no doubt the Court of Appeals could have granted relief on the merits.[4]

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[3] At the certiorari stage, the government also asserted (3) that, by requesting an order "setting aside his guilty plea and grant[ing] such other and further relief as in the circumstances justice may require," Mr. Denedo acknowledged that "relief" can embrace a variety of remedies. The point is without merit as the boilerplate clause referred to is surplusage. *Sharp v. Weinberger*, 798 F.2d 1521, 1524 (D.C. Cir. 1986) (request for "all other relief deemed just and proper" was surplusage); *Crane v. United States*, 41 Fed. Cl. 338, 340 (1998) (request for "such other and further relief this Court deems just and proper" was no more than "standard procedural phrase").

[4] Apart from the transparently inapposite *per curiam* in *Calderon v. Moore*, 518 U.S. 149 (1996) (discussing mootness rather than jurisdiction), the only other authority the government invoked for its claim that a bare remand is "relief"—

The Court of Appeals neither granted relief, nor found Mr. Denedo entitled to it, nor directed the Navy Court to do either of those things. While the "further proceedings" it directed on remand could yield relief from the conviction, that outcome is anything but preordained. Because, as the Court of Appeals itself recognized, relief may be denied, Pet. 32a, it cannot be said to have already "granted relief."

Because most extraordinary writ petitions are filed by the accused, rather than the government, the constraint imposed by § 1259(4)'s "relief" clause operates overwhelmingly to the accused's detriment and the government's benefit. Whether that asymmetry is wise or unwise is not for the Court to determine. It certainly does not lie in the government's mouth to complain about its effect, as it was drafted by the Defense Department. *See* Letter from William H. Taft IV, Gen. Counsel, Dep't of Defense, to Speaker Thomas P. O'Neill, Jr., Aug. 12, 1982, in U.S. Army Legal Svcs. Agency Law Lib. & Gov't App. Div., Legislative History of the Military Justice Act of 1983, 173, 199-200 (1984-85) (transmitting original version of § 1259); *see also id.* at 257, *The Military Justice Act of 1982, Hearings on S. 2521 Before the Subcomm. on Manpower & Personnel, Sen. Comm. on Armed Services,* 97th Cong. 2d Sess. 20 (1982) (noting that Supreme Court review provision

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United States v. Ginn, 47 M.J. 236, 238 (C.A.A.F. 1997)—is a snippet from which it infers that a remand is "relief" because the Court of Appeals used the term "other." This is a slender reed on which to predicate this Court's exercise of jurisdiction in light of the manifest congressional intent. *See* note 3 *supra*.

was in Dep't of Defense proposal but not in Senate bill).

Section 1259 must be read as a whole. Its four paragraphs carefully distinguish between extraordinary writ cases and cases arising on direct review. In the largest category—cases arising on petition for grant of review—Congress limited the certiorari jurisdiction to those in which the Court of Appeals "granted . . . *review*" (§ 1259(3)), whereas § 1259(4) requires that the Court of Appeals have "granted *relief*" (emphases added). The different terms Congress employed cannot be ignored. "This Court presumes that, where words differ . . . , Congress has acted intentionally and purposely." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 54 (2006).

Section 1259(4) must also be understood in light of other aspects of the Court's congressionally-determined appellate jurisdiction. *See* U.S. Const. art. III, § 2, cl. 2. There is a sharp contrast between certiorari jurisdiction over decisions of the Article III courts of appeals and certiorari jurisdiction over decisions of the Court of Appeals for the Armed Forces. Section 1254(1) grants jurisdiction "before or after rendition of judgment or decree." Section 1259(4) is fundamentally different. It does not permit certiorari before judgment. *See* SUPREME COURT PRACTICE, *supra*, at 128, 130. The textual difference between §§ 1254(1) and 1259 reflects a heightened congressional concern that the military appellate process run its course before certiorari becomes available.

Because the Court lacks jurisdiction, the petition should be dismissed as improvidently granted.[5]

II. Mr. Denedo's Petition for a Writ of Error Coram Nobis is "[N]ecessary or [A]ppropriate in [A]id of" the Jurisdiction of the Appellate Military Courts

For nearly half a century, appellate military courts have entertained collateral challenges to court-martial convictions.[6] Doing so has been en-

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[5] It is of no moment from the standpoint of this Court's jurisdiction that, if the military courts in the end deny the relief Mr. Denedo seeks, examination of the Court of Appeals' coram nobis authority will have to await some future case. If, following the proceedings on remand, his plea is set aside by the Navy Court, nothing will prevent the government from seeking this Court's review of the Court of Appeals' earlier assertion of jurisdiction. This is so because the Judge Advocate General can certify the case to the Court of Appeals, Art. 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2); *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981); C.A.A.F.R. 4(a)(2), and that would render it eligible for review under § 1259(2).

[6] *E.g.*, *Thompson v. United States*, 60 M.J. 880 (N.-M. Ct. Crim. App. 2005); *Seelke v. United States*, 21 U.S.C.M.A. 299, 45 C.M.R. 73 (1972); *Maze v. U.S. Army Court of Military Review*, 20 U.S.C.M.A. 599, 44 C.M.R. 29 (1971); *Coleman v. United States*, 21 U.S.C.M.A. 171, 44 C.M.R. 225 (1971); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966) (appellate military courts can issue writs of error coram nobis after final judgment); *In re Taylor*, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961); *United States v Tavares*, 10 U.S.C.M.A. 282, 283, 27 C.M.R. 356, 357 (1959) (assuming without deciding that court has jurisdiction to issue writ of error coram nobis after final judgment); *United States v. Buck*, 9 U.S.C.M.A. 290, 293, 26 C.M.R. 70, 73 (1958) (assuming without deciding that Court of Military Appeals (Court of Appeals' predecessor) has juris-

tirely proper, and the government's effort to disable this key element of appellate military justice is mistaken and should be rejected. The decision below correctly asserts jurisdiction to entertain a coram nobis petition consistent with the "highly constrained standards" applicable to it. Pet. 10a, 22a. To deny the appellate military courts power to grant that essential, albeit rarely warranted, collateral remedy would be to deny their judicial character, thwart the overall congressional plan, and turn those courts into mere spectators helpless to remedy injustice such as that suffered by Mr. Denedo. The government's position seeks to overturn precedent needlessly, proves too much, and leads to unjust results.

A. *Mr. Denedo's petition is in aid of the jurisdiction of the appellate military courts*

Before a court may exercise All Writs Act power, it must have subject matter jurisdiction, since that statute only permits writs that are "in aid of" jurisdiction. The writ Mr. Denedo sought qualified because his case had been reviewed and affirmed by the Navy Court. That court was required to review the case because his sentence included a bad-conduct discharge. Art. 66(b), UCMJ, 10 U.S.C. § 866(b). The Court of Appeals, in turn, has jurisdiction to review

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diction to issue extraordinary relief after final judgment in extraordinary circumstances); *United States v. Ferguson*, 5 U.S.C.M.A. 68, 86-87, 17 C.M.R. 68, 86-87 (1954) (Brosman, J. concurring); *United States v. Best*, 4 U.S.C.M.A. 581, 585, 16 C.M.R. 155, 159 (1954) ("wide variety of action is available to an appellate court to protect and preserve the integrity of a trial," citing All Writs Act, 28 U.S.C. § 1651(a), and *United States v. Morgan*, 346 U.S. 502 (1954)).

decisions of the Navy Court. Art. 67(a), UCMJ, 10 U.S.C. § 867(a).

When a petitioner seeks collateral relief to modify an action taken within the subject matter jurisdiction of the military justice system (here, the findings or sentence of a court-martial), a writ that is necessary or appropriate may be issued "in aid of" the court's existing jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). The exercise of such power after final judgment, as the Court of Appeals acknowledged, is governed by "highly constrained standards" and only available in "very limited circumstances." Pet. 10a, 22a (citing *Morgan*, 346 U.S. at 511). Mr. Denedo's petition meets those standards.

1. The Court of Appeals' decision is consistent with Goldsmith

Far from conflicting with *Goldsmith*, as the government contends (13), the decision below finds support in that case. Major Goldsmith did not challenge the findings or sentence of his court-martial. Rather, he sought extraordinary relief with respect to an order dropping him from the rolls. That was an administrative action, not a "finding," "sentence," or punishment "that was (or could have been) imposed in a court-martial proceeding." *Goldsmith*, 526 U.S. at 530; *cf. Parisi v. Davidson*, 405 U.S. 34, 44 (1972) (appellate military courts lack jurisdiction over claim for conscientious objector discharge). "[T]he elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the 'aid' of the All Writs Act in reviewing it." *Goldsmith*, 526 U.S. at 535. As a

result, the Court was entirely right to find that the Court of Appeals had exceeded its authority.

But this case does not concern some mere military administrative action. Mr. Denedo challenges his guilty plea and conviction. This is the very core of the court-martial process. The government admits as much, acknowledging (15) that his claim concerns "a judgment" and issues over which the appellate military courts have cognizance. It merely insists that his claim comes too late and that appellate military jurisdiction vanished when direct appellate review came to an end.

The government's argument rests on a double-barreled misreading of *Goldsmith*. First, it points to the word "existing" in the phrase "existing statutory jurisdiction," *Goldsmith*, 526 U.S. at 535, suggesting that it means an appellate military court only has jurisdiction *during* direct review. Gov't Br. 7, 10, 13-15; *see also id.* 27 (substituting "ongoing" for "existing"). But *Goldsmith* did not employ the term "existing" in a temporal sense. Rather, it used "existing statutory jurisdiction" to emphasize the undisputed point that the All Writs Act is not an independent source of jurisdiction and that the underlying source must originate from or exist within some separate statute.

Second, the government seizes on the sentence in *Goldsmith* that observes that "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Goldsmith*, 526 U.S. at 536. It reads this to mean there is no source of continuing jurisdiction over *any aspect* of final military court

judgments for any reason. Gov't Br. 10 (claiming the Court of Appeals "repeated its mistake from *Goldsmith*, where, this Court held, the CAAF had erroneously asserted 'continuing jurisdiction' *over any judgment* that it 'at one time had the power to review'") (emphasis added).

This distorts *Goldsmith*. When the Court observed that the Court of Appeals has no continuing jurisdiction over *everything* related to military court judgments it was not saying that that court has no continuing jurisdiction over *anything* related to them.[7] Indeed—and this is the proof that *Goldsmith* if anything supports Mr. Denedo's case, rather than harming it—*Goldsmith* itself includes an illustration of how an appellate military court has continuing jurisdiction over a final judgment—*viz.*, All Writs Act power to compel adherence to its judgment. *Goldsmith*, 526 U.S. at 536 (noting government concession and citing, *e.g.*, *United States v. United States Dist. Court for Southern Dist. of N.Y.*, 334 U. S. 258, 263–64 (1948)).

Finally, in *Goldsmith* the Court of Appeals had acted after the case was final. Given that that case concerned the Court of Appeals' own jurisdiction, it is unlikely that this Court would, as Judge Ryan suggested, Pet. 55a n.9, pass over in silence an Article 76 infirmity had there been one. After all, the Court expressly noted that "the approved findings and sen-

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[7] The government's revision of *Goldsmith* is in any event squarely at odds with *Morgan*, 346 U.S. at 511: "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy [coram nobis] only under circumstances compelling such action to achieve justice."

tence in Goldsmith's case had become final," while providing an illustration that contradicts the position the government espouses here. *Goldsmith,* 526 U.S. at 536 & n.9.[8] If Article 76 has the effect attributed to it by the government, then once a case becomes final, no military court could take action either to compel adherence to the judgment or to void a conviction for lack of jurisdiction. Judge Ryan's dissent acknowledges that both of these powers may be exercised notwithstanding Article 76, and does so without reference to any authority in the UCMJ. Pet. 46a-47a. Likewise, *Goldsmith* cites nothing in the UCMJ for the proposition that an appellate military court may grant extraordinary relief in a final case. 526 U.S. at 536. Since the appellate military courts are creatures of statute, the only other basis for these powers can be the All Writs Act. The government's construction of Article 76 is, in addition to its other faults, *see* pp. 38-45 *infra*, at odds with *Goldsmith.*

2. The government's concessions are fatal to its argument

The government contradicts its own claim (10, 14) that an appellate military court has no continuing jurisdiction over a final judgment by admitting (27-29) that there are circumstances in which the All Writs Act can be utilized to "aid" such a court's past

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[8] *Goldsmith* indicated that if, rather than simply dropping an officer from the rolls, "a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to the specific provisions of the UCMJ," an appellate military court would have post-finality power to compel adherence to its own judgment. 526 U.S. at 536.

(as well as present or future) jurisdiction. *See Telecommunications Research and Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (All Writs Act can "aid" court's jurisdiction over "past, present, or future" action).

Likewise, all of the judges below—even the dissenters—identified post-finality circumstances in which the All Writs Act may be invoked in aid of the appellate military courts' jurisdiction. Judge Stucky found it unnecessary to determine the scope of that power, but acknowledged that those courts have post-finality power to address "fundamental and inherent problems of jurisdiction" and of course have "jurisdiction to determine" their own jurisdiction. Pet. 34a & n.1. He considered it "established" that the Court of Appeals has coram nobis jurisdiction "in cases in which the jurisdiction of the court-martial is at issue," Pet. 32a, and acknowledged that the appellate military courts may issue post-finality coram nobis relief to correct an "error 'of the most fundamental character.'" Pet. 39a (citing *Morgan*, 346 U.S. at 509 n.15; *United States v. Mayer*, 235 U.S. 55, 69 (1914)).

Judge Ryan agreed with *Goldsmith*'s past-jurisdiction illustration, adding that, "as always, a court may question whether its initial judgment was void in the first instance for want of jurisdiction." Pet. 46a n.2 (citing *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947)). Neither she nor the government make any serious attempt to reconcile the admitted availability of collateral relief after final judgment with their view that the UCMJ precludes relief other than new trial petitions and clemency. The closest the government comes is its claim

(28) that "[a] petition to compel adherence to a final judgment bears no resemblance to the present petition for writ of error coram nobis seeking to alter or overturn that judgment." That claim is wide of the mark. There is no distinction, in terms of jurisdiction, between the collateral relief the government admits is available, on the one hand, and coram nobis, on the other. Writs to compel adherence to a final judgment, to set aside a judgment for want of jurisdiction, or to correct a fundamental error which "rendered the proceeding itself irregular and invalid" are *all* collateral remedies and *all* rest on the same source of past or continuing statutory jurisdiction. The common thread is that these powers, while tightly constrained and available only in extraordinary circumstances, are essential parts of the arsenal of judicial powers that serve to protect and enforce the integrity of final judgments.

The government admits (28) that courts created by Congress have inherent powers that extend past finality. Citing only civil cases, however, it proposes to restrict those powers to the enforcement of judgments. The case they fail to confront is *Morgan*, where the Court applied collateral relief principles in the context of a criminal case and held that

> [c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy [coram nobis] only under circumstances compelling such action to achieve justice.

346 U.S. at 511.

Since the Judiciary Act of 1789, 1 Stat. 73, Congress has recognized that courts cannot function without the power to issue extraordinary writs. The All Writs Act is the successor to § 14 of the Judiciary Act. It "extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts." *Morgan*, 346 U.S. at 506 n.6 (citing Reviser's Note). When Congress enacted the UCMJ and created appellate military courts, it set in motion a complete criminal justice system in which the courts would have these powers. It would be anomalous for an appellate military court to be able to issue extraordinary writs to enforce a final judgment or to set one aside based on a jurisdictional defect but powerless to correct a constitutional or other fundamental error affecting the "'validity and regularity'" of the judgment." *Id.* at 507.

3. The government applies an obsolete standard for the scope of collateral review

Without broadcasting the fact, the government has conceded (27-29) that the appellate military courts have jurisdiction to entertain post-finality petitions for extraordinary relief. The dispute before the Court therefore actually concerns the *scope*, not the *existence*, of that power.

According to the government and Judge Ryan, that power is limited to petitions seeking to enforce a judgment or to declare one void for lack of jurisdiction in the strictest sense. They appear to apply to the appellate military courts the narrow scope of re-

view described for Article III courts in, for example, *In re Grimley*, 137 U.S. 147, 150 (1890)—"[t]he single inquiry, the test, is jurisdiction"—*i.e.*, whether the sentencing court had personal and subject-matter jurisdiction. But that "test" is obsolete. *Johnson v. Zerbst*, 304 U.S. 458 (1938), expanded the scope of jurisdictional challenges by holding that a trial court could lose jurisdiction by failing to provide constitutionally-guaranteed counsel to the defendant. *Id.* at 468 (jurisdiction, though present at the beginning, was "lost" in course of trial by failure to provide counsel for accused). In *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942), the Court broke free of the "jurisdiction" terminology, making clear that collateral review of "the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it." *See also Schlesinger v. Councilman*, 420 U.S. 748, 747 (1975) (otherwise final judgment subject to collateral relief "because of lack of jurisdiction or some other equally fundamental defect"); *Morgan*, 346 U.S. at 512-13 (coram nobis appropriate to remedy denial of Sixth Amendment right to effective assistance of counsel).

4. Toth v. Quarles *is irrelevant*

Invoking *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955), the government argues (29-32) that Mr. Denedo cannot be heard because, having been discharged, he is no longer subject to trial by court-martial. This is simply not so. Embracing this view would upset decades of settled military ju-

risprudence[9] and conflate personal jurisdiction and appellate subject-matter jurisdiction.

At issue in *Toth* was whether the military had jurisdiction to try a former service-member who committed an offense while on active duty but had no relationship with the military at the time of trial. 350 U.S. at 23. The Court held that a court-martial may not try an ex-service-member who had no relationship with the military at the time of trial. This says nothing about the question presented here because the court-martial that convicted Mr. Denedo had jurisdiction over both the person and the alleged offenses. As Chief Judge Effron observed, "[w]hen court-martial jurisdiction has been invoked properly at the time of trial, the jurisdiction of the Court of Criminal Appeals to review the case does not depend on whether a person remains in the armed forces at the time of such review." Pet. 21a (citing *United States v. Davis*, 63 M.J. 171, 176-77 (C.A.A.F. 2006)).

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[9] For example, execution of a punitive discharge "does not deprive the Court [of Appeals] of jurisdiction to grant a petition for review." *United States v. Engle*, 28 M.J. 299 (C.M.A. 1989) (per curiam). Jurisdiction is also unimpaired by the fact that the accused has been released from active duty. *E.g.*, *United States v. Woods*, 26 M.J. 372 (C.M.A. 1988); *United States v. Jackson*, 3 M.J. 153 (C.M.A. 1977); *United States v. Entner*, 15 U.S.C.M.A. 564, 36 C.M.R. 62 (1965); *United States v. Green*, 10 U.S.C.M.A. 561, 28 C.M.R. 127 (1959); *United States v. Speller*, 8 U.S.C.M.A. 363, 368, 24 C.M.R. 173, 178 (1957); *see also Steele v. Van Riper*, 50 M.J. 89 (C.A.A.F. 1999) (administrative discharge during appellate review did not affect power of convening authority or appellate military courts to act on findings and sentence); *United States v. Sippel*, 4 U.S.C.M.A. 50, 52-54, 15 C.M.R. 50, 52-54 (1954) (appellate jurisdiction unaffected by expiration of officer's commission).

The government concedes (31 n.8) that "once court-martial jurisdiction attaches, it continues until the appellate processes are completed." The concession is unavoidable since the government invokes continuing jurisdiction whenever it retries an accused who has been separated before the reversal of his or her conviction. *Davis*, 63 M.J. at 176-77. Military jurisprudence has long recognized that appellate action "reversing the conviction and sentence [does not] prevent petitioner's retrial even though his discharge occurred before the reversal." *Peebles v. Froehlke*, 22 U.S.C.M.A. 266, 268, 46 C.M.R. 266, 268 (1973).

Notwithstanding this, the government proposes to distinguish between those who challenge their conviction on direct review and those who do so on collateral review. There is no basis for such a distinction: a person is either *in* or *out* of the service. When jurisdiction attaches and a conviction has been obtained, the military justice system does not lose jurisdiction as a result of a subsequent change in the accused's status. *Carter v. McClaughry*, 183 U.S. 365, 383 (1902). In *Toth*, jurisdiction did not attach because Toth had not been convicted prior to his discharge.

The fallacy of the government's personal jurisdiction claim is apparent from Rule for Courts-Martial ("R.C.M.") 1210(b). That rule, which is part of the *Manual for Courts-Martial*, provides that "[a] petition for a new trial may be submitted by the accused personally, or by accused's counsel, *regardless whether the accused has been separated from the service*" (emphasis added). A former service-member who has been convicted by court-martial and has

completed direct appellate review may thus be court-martialed again on the original charges if a new trial is ordered. That situation is indistinguishable from cases in which a writ of error coram nobis is issued. Both entail continuing court-martial jurisdiction over former service-members after the completion of direct appellate review. The government's *Toth* argument cannot be accepted without invalidating R.C.M. 1210(b).[10]

B. *Mr. Denedo's petition is "agreeable to the usages and principles of law"*

Coram nobis is a "vehicle for collateral redress of denials of constitutional rights, usually because the traditional procedures for affording such relief are for some reason inadequate." *Morgan*, 346 U.S. at 516 n.5. This is a classic coram nobis case. The writ is necessary and appropriate because Mr. Denedo has no other adequate remedy. The government contends otherwise, suggesting that coram nobis no longer exists, it is ill-suited to or unavailable in the military justice system, and alternative remedies are available. None of these contentions withstands scrutiny.

1. Coram nobis is an available remedy

Citing (32) *Carlisle v. United States*, 517 U.S. 416, 429 (1996), and quoting *United States v. Smith*, 331

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[10] The government's *Toth* argument also proves too much because, if it were valid, the Article III courts and the Court of Federal Claims also could not grant relief in respect of a final court-martial—something the government elsewhere correctly concedes (34-35) they can do.

U.S. 469, 476 n.4 (1947), the government claims that coram nobis is neither necessary nor appropriate because "it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate."

"Difficult" does not mean "impossible." *Carlisle* does not mention *Morgan*, much less overrule it. Nor does rarity of use mean the writ has somehow fallen into desuetude. Rejecting a government argument that 28 U.S.C. § 2255 "should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts," *Morgan* held that coram nobis is available after final judgment and exhaustion or waiver of any statutory right of review in exceptional circumstances. *Morgan*, 346 U.S. at 511. The government's brief never even mentions *Morgan*'s holding or the fact that it specifically characterized the *Smith* footnote quoted above. *Morgan* makes clear that *Smith* was merely "referr[ing] to the *slight need* for a remedy like coram nobis in view of the modern substitutes." *Morgan*, 346 U.S. at 509 n.15 (emphasis added). *Morgan* recognized that, while the occasions for coram nobis relief are "infrequent, no one doubts its availability at common law." *Id.* at 507.[11]

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[11] *See United States v. Kwan*, 407 F.3d 1005 (petitioner satisfied threshold coram nobis requirements and demonstrated that counsel's erroneous advice on immigration consequences of guilty plea was deficient and prejudicial); *United States v. Castro*, 26 F.3d 557, 559-63 (5th Cir. 1994) (petitioner satisfied threshold coram nobis requirements; remanded for ineffective assistance determination on claim that counsel failed to inform him, prior to guilty plea, of opportunity to request judicial recommendation against deportation).

What the government cites (12, 32, 38) as coram nobis's vices—rarity, unsettled scope, and absence of time limits—are actually its virtues. The genius of this gap-filler remedy is that it is available in those rare circumstances when "no other remedy [is] available" and "sound reasons exist[] for failure to seek appropriate earlier relief." *Morgan*, 346 U.S. at 512. In those situations, a request for coram nobis relief must be heard, "[o]therwise a wrong may stand uncorrected which the available remedy would right." *Id.* at 512, 516 n.5; *see also* 2 STEVEN CHILDRESS & MARTHA DAVIS, FEDERAL STANDARDS OF REVIEW § 13.01, at 13-3 (3d ed. 1999) ("if more usual avenues to relief are foreclosed, or if the writ raises 'matters which, if proven, would amount to a denial of a fair trial and which cannot be raised on direct appeal because they are outside the scope of the trial,' coram nobis may be the only recourse to prevent a substantial injustice") (citing *United States v. Taylor*, 648 F.2d 565, 573 n.24 (9th Cir. 1981)).

The government suggests (32) that there is less need for coram nobis in the military justice system than in civilian courts. If anything, the reverse is true because the UCMJ has no analogue to § 2255 or any statutorily defined procedure for collateral review. Rather, Congress conferred rulemaking power on the President, the Judge Advocates General, and the Court of Appeals. Arts. 36, 66(f), 144, UCMJ, 10 U.S.C. §§ 836, 866(f), 944. The parameters of collateral relief under the All Writs Act were left to be determined through the common law process and exercise of those rulemaking powers.

Judge Ryan characterized the resulting procedures for post-conviction fact-finding as "unwieldy

and imperfect," Pet. 47a, but neither she nor the government challenge the legitimacy of those procedures, and the fact remains that the appellate military courts have been employing them successfully to adjudicate post-conviction proceedings for decades. *DuBay*, 37 C.M.R. at 413. The current arrangements—and the decision below—are actually consistent with the government's repeatedly expressed views. *See* pp. 45-56 *infra*.

2. Mr. Denedo has no other adequate remedy

The government insists (32-35) that a writ of error coram nobis is not "necessary or appropriate" because "adequate alternative remedies are available to convicted former service members" like Mr. Denedo. This claim is specious.

Direct review is not an "adequate alternative remedy" because Mr. Denedo did not learn that he had been gravely misadvised until long after the completion of direct review. Nor could he have filed a new trial petition, Art. 73, UCMJ, 10 U.S.C. § 873, because that remedy is unavailable to accuseds who plead guilty, as Mr. Denedo did. *See* R.C.M. 1210(a).[12] Even if that were not the case, a new trial

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[12] R.C.M. 1210(a) was amended in 1998 "to clarify its application consistent with interpretations of Fed. R. Crim. P. 33 that newly discovered evidence is never a basis for a new trial of the facts when the accused has pled guilty." R.C.M. 1210(a) (Analysis), *Manual for Courts-Martial, United States* (2008 ed.), at A21-96. "Article 73 authorizes a petition for a new trial of the facts when there has been a trial. When there is a guilty plea, there is no trial." *Id.*; *see* 26 MOORE'S FEDERAL PRACTICE § 633.02[1], 633-7 (3d ed. 1997) ("Rule 33 is only available where

petition would not have been available anyway because Mr. Denedo did not and could not discover the error until after Article 73's two-year deadline had expired.[13]

The government cites (25-26) a brief exchange during the 1949 House hearings on the UCMJ as proof that Congress intended new trial petitions to be the only form of post-conviction collateral attack. Legislative history is not determinative here because the text of Article 76 has a "clear purport." *Schlesinger*, 420 U.S. at 752. In any event, the departmental witness's comments were never developed much less adopted in a committee report. They reflected a superficial and incorrect understanding of the law of new trials and coram nobis. Those remedies serve different purposes and are not fungible. Notably, one who has pleaded guilty cannot file for a new trial, but can seek coram nobis. *See* p. 28 & n.12 *supra*. The legislative history, moreover, is not *res nova*. The Court surveyed it in *Schlesinger*, and concluded that "an affirmative intent to preclude all other forms of collateral relief, on whatever ground, cannot be inferred from these scattered statements in the legislative history." 420 U.S. at 752.

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a trial occurred; the Rule does not make a new trial available to one who pled guilty").

[13] Even though Article 73 is modeled after Fed. R. Crim. P. 33, a non-jurisdictional claims-processing rule, *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam), it contains a statutory time limit that is presumably jurisdictional. *See Bowles v. Russell*, 127 S. Ct. 2360, 2365-66 (2007); *cf. United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009) (held, applying *Bowles*, UCMJ's statutory 60-day period for filing petition for grant of review is jurisdictional).

The government also proposes (33) two collateral remedies within the military justice system as examples of "adequate alternative remedies . . . available to convicted former service members": "a convicted service member may petition the military courts in certain circumstances, *i.e.*, to compel adherence to the final judgment or to challenge the court-martial's jurisdiction." Not only do these remedies necessarily involve continuing jurisdiction after final judgment to entertain petitions for collateral relief within the military justice system (and thus support Mr. Denedo's case), but the second one admits the availability of coram nobis relief, as that is the classic vehicle to impeach a judgment collaterally based on a jurisdictional defect. The government is using obsolete pre-*Johnson v. Zerbst* terminology when it refers to a "petition . . . to challenge the court-martial's jurisdiction." Jurisdictional challenges to a final judgment on collateral attack extend to constitutional defects and other fundamental errors. *See* p. 22 *supra*.

The government also suggests (33-35) that Mr. Denedo can invoke the district courts' federal question jurisdiction or the Court of Federal Claims' Tucker Act jurisdiction. Not so. The applicable six-year statutes of limitation, 28 U.S.C. §§ 2401(a), 2501, expired before removal proceedings were initiated against him and he became aware of the gross error in Mr. Ceballos's advice. *See Walters v. Secretary of Defense*, 725 F.2d 107, 114 (D.C. Cir. 1983) (limitation period begins to run when discharge is final), *reh'g denied*, 737 F.2d 1038 (1984) (en banc) (per curiam); *Martinez v. United States*, 333 F.3d 1295, 1303 & n.2 (Fed. Cir. 2003) (en banc) (collecting cases) (cause of action accrues on date of discharge).

Even if there were a doctrine of equitable tolling, *but see Bowles v. Russell, supra*, Mr. Ceballos was not a government official and his error cannot be imputed to the government.

Under the assumption that all claims against the United States would be time-barred, the government cites (35) *Goldsmith*, 526 U.S. at 539 n.12, for the proposition that "[i]t is enough that respondent's 'constitutional objections *could* have been addressed by the federal courts.'" This reliance on *Goldsmith* is again misplaced. *Goldsmith* observed that, even assuming the Court of Appeals had some basis for jurisdiction to entertain Goldsmith's claim, "resort to the All Writs Act would still be out of bounds" because there are "alternative remedies available to a servicemember demanding to be kept on the rolls." *Id.* at 537. The Court pointed out that Congress had created administrative bodies within the military to review the very sort of agency action about which Goldsmith complained and that federal courts have authority to review agency action, whether or not Goldsmith availed himself of the Board for Correction of Military Records option. *Id.*

There was also no statute of limitations issue in *Goldsmith*. "[T]he Air Force notified Goldsmith in 1996 that it was taking action to drop him from the rolls." *Id.* at 532. By 1999, when the Court observed that his "constitutional objections could have been addressed by the federal courts," he still had three more years in which to sue. An "alternative remedy" therefore was in fact available to review his claim. *Goldsmith* therefore is not authority for the proposition that the past availability of a remedy to correct a constitutionally impaired court-martial conviction

is sufficient where, as here, the defect is not discovered until after the remedy no longer exists. Unlike Goldsmith, Mr. Denedo did not discover the defect until after the statute of limitations expired. The government has never claimed that he deliberately bypassed a known, available remedy.

Trenkler v. United States, 536 F.3d 85 (1st Cir. 2008), which the government cites (35) with a "*cf.*" signal, is inapposite. It concerns the application of 28 U.S.C. § 2255's savings clause. If anything, the analogy cuts against the government's claim.[14] The saving clause is implicated only if the substitute remedies (for traditional habeas relief) that Congress provided in § 2255's "comprehensive remedial scheme for post-conviction relief" prove to be "inadequate" or "ineffective." *Trenkler*, 536 F.3d at 96-97. In other words, the savings clause analysis looks at the "adequacy and effectiveness" of remedies within, not outside, the § 2255 remedial scheme. Coram nobis is appropriate in Article III courts only if the § 2255 remedy is inadequate or ineffective.

By analogy, coram nobis is appropriate here because the one judicial post-conviction remedy in the UCMJ—a new trial petition—is, as we have already explained, wholly inadequate. Article 73 never afforded Mr. Denedo an opportunity for judicial review of his claim because he pleaded guilty.

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[14] Contrary to the government's suggestion (32), *Trenkler* correctly recognizes that coram nobis is a "gap-filler" and that *Morgan* "made it pellucid that section 2255 does not preempt the entire array of common-law writs authorized under the All Writs Act, 28 U.S.C. § 1651." 536 F.3d at 96-76 (citing *Morgan*, 346 U.S. at 510-11).

The government's characterization of Article 73 as a comprehensive post-conviction remedy or a complete substitute for coram nobis relief is mistaken.[15] It contains no clear expression of congressional intent to provide a complete substitute for any of the prerogative writs. At best, it is an analogue to Fed. R. Crim. P. 33, not § 2255. Enacted just two years before the UCMJ, § 2255 shows how Congress makes itself clear when it intends a statutory remedy to be exclusive or a substitute for extraordinary writs.[16]

Had Mr. Denedo been convicted in district court, he could have sought coram nobis (for which there is no time limit) if he was not in custody. If he was in custody, he could file under § 2255 because the one-year period of limitations would not have started to run until the "date on which the facts supporting the

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[15] "A motion for new trial is historically distinguishable" from coram nobis. George H. Dession, *The New Federal Rules of Criminal Procedure*, 56 YALE L.J. 197, 233 (1947). "Where a defendant enters a plea of guilty under duress or because of fraud or mistake, the remedy by writ of error coram nobis is of peculiar applicability in view of the absence of any other means of relief." Abraham L. Freedman, *The Writ of Error Coram Nobis*, 3 TEMPLE L.Q. 365, 398 (1929). Judge Ryan's suggestion that Mr. Denedo's claim is "nothing more than a petition for a new trial, dressed up as a writ of coram nobis," Pet. 53a & n.8, is therefore incorrect.

[16] *Trenkler* is also factually distinguishable. Unlike Trenkler, Mr. Denedo could not have discovered the facts supporting his claim by the exercise of due diligence until after the completion of direct review and expiration of the deadlines for a new trial petition (even if it were an available, effective option) and claims against the United States. He did not neglect to avail himself of any statutory post-conviction remedy under the UCMJ that would have offered an adequate or effective means of rectifying the error.

claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(4).[17]

3. Appellate military courts may issue writs of error coram nobis

The government points out (36-37) that coram nobis is only available in (1) the jurisdiction and (2) the court in which the conviction is adjudged. The first is true but no help to the government because Mr. Denedo applied within the proper jurisdiction: the military courts. As for the second, because courts-martial are not standing courts, and disappear once their work is done, *Runkle v. United States*, 122 U.S. 543, 555-56 (1887), he applied to the first-level appellate court within the jurisdiction. The worst that can be said is that his petition should have been labeled a petition for a writ of error coram *vobis*. Accepting this part of the government's argument would "exalt nomenclature over substance." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 164 (1984) (quoting *Browder v. Director, Ill. Dept. of Corr'ns*, 434 U.S. 257, 272 (1978) (Blackmun, J., joined by Rehnquist, J., concurring), and cit-

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[17] *Morgan*, 346 U.S. at 512-13 (coram nobis appropriate to remedy denial of Sixth Amendment right to the assistance of counsel); *Kwan*, 407 F.3d at 1017-18; *Castro*, 26 F.3d at 559-63; *Couto*, 311 F.3d at 187-88 (counsel's affirmative misrepresentation as to deportation consequences of defendant's guilty plea was objectively unreasonable and prejudicial, and rendered plea involuntary; suggesting that "standards of attorney competence [may] have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable" but not reaching issue).

ing *Schlesinger*, 420 U.S. at 742 n.5). Coram vobis is among the recognized writs, *Loving v. United States*, 62 M.J. 235, 252 (C.A.A.F. 2005) (petition submitted to superior court is writ of error coram vobis); *e.g.*, *Thornton v. Bruton*, 18 M.J. 412 (C.M.A. 1984) (mem.), and a proper vehicle for seeking post-conviction relief from an appellate court such as the Navy Court or the Court of Appeals. The substance of the writ governs, not the label. *E.g.*, *Loving*, 62 M.J. at 252 & n.108, citing 2 STEVEN CHILDRESS & MARTHA DAVIS, FEDERAL STANDARDS OF REVIEW § 13.01, at 13-8.

The government's claim (37) that the military justice system is ill-suited to coram nobis relief is equally unavailing. The post-conviction proceedings outlined in the decision below, Pet. 32a, are no different from post-trial proceedings the appellate military courts have been conducting since the 1960s. *See DuBay*, *supra*. Those courts have devised "a variety of procedures to ensure that a military accused's rights are fully protected." *United States v. Murphy*, 50 M.J. 4, 5-6 (C.A.A.F. 1998) (citing, *e.g.*, *United States v. Henry*, 42 M.J. 231, 238 (C.A.A.F. 1995) (remanding for consideration of affidavits); *DuBay* (evidentiary hearing)). The government criticizes (39) these post-conviction procedures as "unwieldy" and "imperfect," and no one would claim that they are perfect. But that is no basis for leaving without a remedy those individuals such as Mr. Denedo who can turn nowhere else. Doing so would not foster public confidence in the administration of justice in the Armed Forces.

The government's additional claim (39) that the decision below will divert military resources is not only unfounded but irrelevant to jurisdiction. Even though coram nobis has been available from the military courts for decades, *see Frischholz*, *Del Prado*, such cases remain a minor part of the workload of the courts of criminal appeals and the Court of Appeals. In the last 10 years for which data are available, the Court of Appeals received only 10 coram nobis petitions.[18] During the same decade, there were also 176 writ appeals. The court granted relief or remanded in only a handful. Even if a substantial portion of the writ appeals sought coram nobis relief, they would still not unduly burden the military in general or the military justice system in particular. The vast majority of coram nobis cases are dismissed in the briefest of orders. *See* 59 YALE L.J. at 792 (those who oppose coram nobis relief typically assert that the courts will be "swamped with a small avalanche of motions . . . But the spectre of judicial overwork often fails to materialize, and even if it does, it has no bearing on the need for expunging unjust convictions") (citing *Potter v. Dowd*, 146 F.2d 244, 249 (7th Cir. 1944)).

To the extent that the administration of any criminal justice system entails effort or expense democratic society has long since determined that the game is worth the candle. If cost alone were a legitimate reason not to entertain coram nobis petitions in the military justice system there would also be no such thing as rehearings ordered on direct review,

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[18] The court's annual reports are available at http://www.armfor.uscourts.gov/Annual.htm (last visited Feb. 8, 2009).

habeas petitions, new trial petitions, or any other post-conviction review. "Compliance with any judicial process requires some incremental expenditure of resources." *Boumediene v. Bush*, 128 S. Ct. 2229, 2261 (2008) (finding "no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims").

Nor is there any merit to the government's claim (39-40) that defense counsel "would likely be" required at government expense and contribute to a flood of "frivolous petitions." A former servicemember has no constitutional right to post-conviction military defense counsel to mount a collateral attack, *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), and while military appellate defense counsel happen to have been made available to Mr. Denedo, that was a matter of grace, as there is no right to military counsel on collateral review. Art. 70(e), UCMJ, 10 U.S.C. § 870; *United States v. Foxworth*, 2 M.J. 508, 509 (A.C.M.R. 1976) (no right to military counsel for post-final judgment coram nobis).[19]

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[19] The government has sensibly abandoned its earlier claims, Pet. 23-24, that the military justice system lacks power to compel testimony by discharged coram nobis petitioners and that even allowing punitively discharged personnel to enter a military installation for the purpose of appearing at a coram nobis hearing would harm the government. *See generally* Resp. Brief in Opposition 13-14.

C. *Article 76 is no bar to Mr. Denedo's coram nobis petition*

The Court of Appeals' interpretation of Article 76 to permit collateral review is supported by precedent. It is consistent with the principle that statutes should not be construed to preclude review of constitutional claims absent a "heightened showing" of congressional intent to do so. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Schlesinger*, 420 U.S. at 753; *see also Johnson v. Robison*, 415 U.S. 361, 367 (1974). That standard is required "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12 (1986). The government has not even attempted to make that "heightened showing."

Schlesinger, 420 U.S. at 749, teaches that Article 76 is a prudential restraint, not a jurisdictional one. The Court squarely rejected a government argument that it is a jurisdiction-stripping provision that precludes all forms of collateral relief in all forums with the sole exception of writs of habeas corpus in the Article III courts. *Id.* at 744-53.

Schlesinger observed that, long before Article 76 or its predecessor—Article of War ("AW") 50(h)—were enacted, "settled principles of the law of judgments have been held from the start fully applicable to court-martial determinations." *Id.* at 747. The first such principle is that military court judgments, "like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have res

judicata effect and preclude further litigation of the merits." *Id.* at 746 (citing 1B JAMES W. MOORE, FEDERAL PRACTICE 0.405[4.-1] 634-37 (2d ed. 1974)). The second principle is that void judgments, although final for purposes of direct review and res judicata, are subject to collateral attack in an appropriate forum—*i.e.*, a court with subject matter jurisdiction over the suit. *Id.* at 746-47 (citing Restatement of Judgments § 11 (1942); FLEMING JAMES, CIVIL PROCEDURE § 11.5 (1965); *compare Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965), *with Davies v. Clifford*, 393 F.2d 496 (1st Cir. 1968)). A judgment is void, and therefore subject to collateral relief, "because of lack of jurisdiction or some other equally fundamental defect." *Schlesinger*, 420 U.S. at 747; *Morgan*, 346 U.S. at 509 n.15, 512-13; *Waley*, 316 U.S. at 104-05; *Johnson v. Zerbst*, 304 U.S. at 468. *Schlesinger* further noted that court-martial convictions have historically been subject to various forms of collateral attack. 420 U.S. at 747-48 (citing *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806); *Dynes v. Hoover*, 16 U.S. (20 How.) 65 (1857); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Runkle*).

Against that backdrop, the Court examined the language of Article 76 and concluded that its "clear purport" is that of a basic finality rule which does nothing more than "define[] the point at which military court judgments become final and requires that they be given res judicata effect." *Schlesinger*, 420 U.S. at 749, 752; *see also Gusik v. Schilder*, 340 U.S. 128 (1950) (construing identical finality language in AW 53 as merely defining terminal point for direct review within military appellate courts); *Burns v. Wilson*, 346 U.S. 844 (1953) (Frankfurter, J., concur-

ring in denial of rehearing) (UCMJ's legislative history "strongly suggests that it was precisely in the realm of collateral judicial attack on courts-martial that the concept of 'finality' was intended not to operate").

Schlesinger's construction of Article 76 is supported by the text. First, by qualifying the term "appellate review" with the words "records of trial" and "provided by this chapter," it plainly refers to the finality of ordinary *direct* review—not extraordinary *collateral* review. Direct review of "records of trial"—as opposed to extrinsic material—is the only type of "appellate review . . . provided by" (as opposed to permitted by) "this chapter." Second, it uses traditional final judgment and res judicata terminology—*i.e.*, "final and conclusive" and "binding upon all . . . courts . . . of the United States."[20] Third, it states that there are only three exceptions to the binding effect of military court judgments: new trial petitions (Article 73); clemency from the service secretary (Article 74); and presidential authority. Each of these is, by its very nature, an exception to Article 76's binding effect, as each permits, to a varying degree, the very thing res judicata would otherwise prohibit: relitigation of the facts underlying the conviction and issues that were (or could have been) adjudicated on direct review. A new trial petition, for example, seeks to re-litigate the findings and sentence. It

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[20] *E.g.*, *Adams v. Preston*, 63 U.S. 473, 479 (1859) ("judgments . . . are final and conclusive adjudications of the subject matter of this suit, and form res judicata against complainant"); *Forsyth v. City of Hammond*, 166 U.S. 506, 520 (1897) ("final adjudication" is "binding and conclusive, upon the principle of res judicata").

would be a meaningless exception if the original trial were to remain binding. Likewise, clemency involves the power to modify the sentence to the benefit of the accused. Even if Article 76 did not expressly refer to Articles 73 and 74 and presidential authority, they would nonetheless operate as res judicata exceptions.

Based on Article 76's text, *Schlesinger* construed it to mean simply that final judgments of military courts, like those of any court of competent jurisdiction not subject to further *direct* review for errors of fact or law, have res judicata effect and preclude further litigation of the merits. *Schlesinger*, 420 U.S. at 746-53.[21] At the same time, the Court made clear that "there is no necessary inconsistency between [Article 76's finality rule] and the standard rule that void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject-matter jurisdiction." *Id.* at 749; Restatement of Judgments § 11 (1942).

Moreover, as Chief Judge Effron explained, Pet. 9a-10a, both *Schlesinger*, 420 U.S. at 753 n.26, and *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969), referred with approval to the Court of Military Appeals' deci-

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[21] The legislative history of Article 76 is consistent with this interpretation. It was derived from AW 50(h). S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949); H. Rep. No. 491, 81st Cong., 1st Sess. 35 (1949). The legislative history of that provision, in turn, indicates that it was intended to codify and make "explicit" what the law and practice had been for many years—*i.e.*, final judgments of military courts had res judicata effect. H. Rep. No. 1034, 80th Cong., 1st Sess. 7, 12 (1947); *Hearings Before H. Comm. on Armed Services on H.R. 2575*, 80th Cong., 1st Sess. 2118 (1947) (testimony of Brig. Gen. Hubert D. Hoover, Ass't Judge Advocate General of the Army).

sion in *Frischholz,* the landmark 1966 case in which that court first squarely held that it has jurisdiction to grant coram nobis relief post-finality.

The government's effort to discount *Schlesinger*'s reliance on *Frischholz* is unavailing. It contends that *Schlesinger* cites that case only for what the government characterizes as the "more limited" proposition that Article 76 "'does not insulate a conviction from subsequent attack in an appropriate forum.'" It is clear, however, that *Schlesinger* cites *Frischholz* with approval with respect to its full import. The language the Court chose to quote represents *Frischholz*'s fundamental proposition: that military convictions are subject to collateral attack in *an appropriate forum*:

> The Court of Military Appeals stated that Art 76 "does not insulate a conviction from subsequent attack in *an appropriate forum.* At best it provides finality only as to interpretations of military law by this Court. . . . It has never been held to bar review of a court-martial, when fundamental questions of jurisdiction are involved."

Schlesinger, 420 U.S. at 753 n.26 (quoting *Frischholz*, 16 U.S.C.M.A. at 151, 36 C.M.R. at 307) (emphasis added).[22]

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[22] The government's reading of *Schlesinger* imputes to the Court a superficial understanding of *Frischholz.* The Court was plainly aware of the complexity of that case's implications. Years earlier, in *Noyd*, 395 U.S. at 695 n.7, when it first cited *Frischholz* with approval, it was careful to note, in light of *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968), that "[a] different question would, *of course*, arise in a case which the Court of Military Appeals is not authorized to

The government claims (19) that because Article 76 is "subject only to the three explicitly enumerated exceptions," it must be read to preclude any form of collateral relief. This reflects a basic misunderstanding of the law of judgments. There is no reason to refer to collateral remedies in Article 76 because the general principle that a final judgment is binding carries with it the standard qualification that void judgments may be collaterally impeached. *Schlesinger*, 420 U.S. at 752-53.

If Congress had intended that Article 76 alter the settled law of judgments it would have said so expressly. Moreover, as *Schlesinger* pointed out, "nothing in Art. 76 distinguishes between habeas corpus and other remedies also consistent with well-established rules governing collateral attack." 420 U.S. at 751. The language of Article 76 is "singularly inapt" to support such a distinction. *Id.* Given that Article 76, by its plain meaning, has the same effect on "all . . . courts," 10 U.S.C. § 876, its language is equally "inapt" to preclude Article I appellate military courts from entertaining collateral attacks on void judgments.[23]

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review under the governing statutes" (emphasis added). (When such a case did arise, the Court of Military Appeals properly denied relief, noting that "[r]esort to extraordinary remedies cannot serve to enlarge our power to review cases, but only to aid us in the exercise of the authority we already have." *United States v. Snyder*, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969).

[23] The government's Article 76 argument suffers from the obvious defect that, if it were valid, it would mean that neither the Article I Court of Federal Claims, 28 U.S.C. § 171(a), nor the district courts, could collaterally review courts-martial, even though this is settled law. Faced with this inconvenient aspect of its position, the government improbably seeks (20-21)

The government cites (18, 37) *Witham v. United States*, 355 F.3d 501, 505 (6th Cir. 2004), for the proposition that "[n]either the Uniform Code of Military Justice nor the Manual for Courts-Martial provides for collateral review within the military courts." *Witham* relies entirely on *United States v. Murphy*, and *Murphy* does not stand for that proposition. Rather, *Murphy* merely pointed out that, "[u]nlike the practice in the United States Courts of Appeals and District Courts, neither the UCMJ nor the Manual for Courts-Martial, United States, 1984, provides procedures for collateral, post-conviction attacks on guilty verdicts." *Murphy*, 50 M.J. at 5 (citing § 2255). The absence of statutorily articulated procedures, however, does not mean that appellate military courts have no authority to create them or hear post-conviction claims of constitutional or fundamental error. To the contrary, the All Writs Act plainly applies to the Article I appellate military courts, and since the 1960s it has been settled law that those courts may grant extraordinary writs. *Noyd*, 395 U.S. at 695 n.7.

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to impose a different meaning on Article 76's finality rule depending on whether collateral relief is sought in the Article III courts or in the appellate military courts. Nothing in the statutory text supports the distinction the government would have the Court make. Article 76 cannot be jurisdictional yet still permit the equitable exceptions the government admits exist. *Bowles*, 127 S. Ct. at 2366.

D. *The decision below is consistent with precedent and the government's own longstanding view*

The decision below is well-reasoned and supported by settled precedent. It reflects a view the government itself has advanced in litigation and before Congress. Since the case presents only a question of statutory interpretation, adherence to stare decisis is appropriate because Congress is free to change the UCMJ at any time.

1. The government's position in the courts

The position the government has taken here is diametrically opposed to the one it advanced in *Frischholz v. Sec'y of the Air Force*, Civil No. 1915-64 (D.D.C. Apr. 7, 1965); *see Frischholz*, 16 U.S.C.M.A. at 151, 36 C.M.R. at 307. Frischholz's conviction had become final under Article 76 and he was dismissed from the service. Five years later, when he sought coram nobis from the district court, the government moved to dismiss, arguing that the "petition is one peculiarly within the jurisdiction of the Court of Military Appeals." Def. Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Gov't Frischholz Mot") 7:

> The Court of Military Appeals is a court established by Act of Congress, 10 U.S.C. § 867, and it should necessarily follow that that Court should have the same authority under 28 U.S.C.A. 1651(a) that the Supreme Court in the *Morgan* case recognized in civil courts in

> criminal cases arising and heard in United States District Courts.
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> * * *
>
> By analogy, the Supreme Court has recognized in *Hysler v. Florida*, 315 U.S. 411, 416, 417 (1942) that each State is free to devise its own way of securing justice in treating writs of error coram nobis. Surely the Court's language (p. 417) is broad enough to apply the authority of the Court of Military Appeals so that it too may treat the writ of error coram nobis in its own way and in its own military jurisdiction.

Gov't Frischholz Mot. 4-7.

In the alternative, the government sought dismissal because Frischholz deliberately failed to seek a new trial under Article 73:

> Since Congress has provided machinery and procedure within the military so that one convicted by courts-martial can collaterally attack his court-martial, this is persuasive evidence that any collateral attack thereon should be taken within the military structure.

Id. 12-13.

The district court dismissed, ruling that Frischholz should seek collateral review within the military justice system in the first instance. *Frischholz*, 16 U.S.C.M.A. at 151, 36 C.M.R. at 307. When he then sought coram nobis from the Court of Military Appeals, the government reversed course and asserted that that court had no jurisdiction under Articles 67 and 76, UCMJ, 10 U.S.C. §§ 867, 876. *See id.* at 151, 36 C.M.R. at 307. The court held that

it had jurisdiction, but denied coram nobis relief on the merits. *Id.* at 152-53, 36 C.M.R. at 308-09.

In 1972, the government conceded partial relief in an Army case in which a petitioner had sought post-finality coram nobis from the Court of Military Appeals. *Seelke*, 21 U.S.C.M.A. at 300, 45 C.M.R. at 74.

In a 1990 Tucker Act case, the government attempted to persuade the Federal Circuit that Congress intended the appellate military courts—not the Claims Court—to conduct post-finality collateral review of courts-martial. Brief for Appellee 8-10, *Matias v. United States*, 923 F.2d 821, 825 (Fed. Cir. 1990). Invoking the canon that statutes should be interpreted to avoid unreasonable results, it argued that "[i]t is illogical to assume that Congress would have granted jurisdiction to two Article I civil courts"—the Court of Military Appeals and the Claims Court—"for the purpose of determining the legality of court-martial proceedings." *Id.* at 11. The Federal Circuit rejected the government's argument that § 1259, *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989), and other developments "undermine[d] the rationale for collateral attack on court-martial convictions in the Claims Court," but affirmed that court's conclusion that the "military gave full and fair consideration to each of Matias' claims in proceedings that satisfied the requirements of due process of law." *Matias*, 923 F.2d at 826.

Little more than a year ago, in *Tatum v. United States*, Civil No. 06-2307-RDB, 2007 WL 2316275 (D. Md. Aug. 7, 2007), the government argued that

> Tatum failed to exhaust his available military remedies. Specifically, Tatum may re-

> quest immediate relief under 28 U.S.C. § 1651 (All Writs) through either the Navy Marine Corps Court of Criminal Appeals or the United States Court of Appeals for the Armed Forces (CAAF). The applicability of this remedy is particularly evident in this case since those courts have the authority to review and grant relief even in cases where the servicemember has served a period of confinement and been discharged. *See* 10 U.S.C. §§ 866(c)-(d), 867(a)-(d); *Thompson v. United States*, 60 M.J. 880 (NMCCA 2005).

Def. Motion to Dismiss, or, in the Alternative, for Summary Judgment 7. The court dismissed Tatum's complaint on the ground that he had failed to exhaust by seeking coram nobis relief from the military courts. 2007 WL 2316275 at *4, *6-*7 (citing *Thompson*, 60 M.J. at 883, for proposition that appellate military courts have jurisdiction to grant coram nobis relief).

2. The government's position in the legislative process and what Congress knew

Congress was not in the dark about *Frischholz* or the fact that appellate military courts have been entertaining post-finality collateral attacks for many years. While that case was pending, Judge Ferguson of the Court of Military Appeals described it (albeit not by name) in testimony, including the fact that the government had switched positions on the jurisdictional issue. *Bills to Improve the Administration of Justice in the Armed Services, Hearings on S. 745 through S. 760 Before the Subcomm. on Constitu-*

tional Rights, Sen. Judiciary Comm., and Spec. Subcomm., Sen. Armed Services Comm., 89th Cong., 2d Sess. 303 (1966).[24] The committees' subsequent summary of military justice identified the "Writ of Error Coram Nobis (Military or Civilian)" as one of several remedies under the heading "Collateral Attack on Court-Martial Action." *Id.* at 662, 667.

In 1968—only two years after *Frischholz* and having heard from Judge Ferguson—Congress reinforced the principle that appellate military courts have All Writs Act power by renaming the Court of Military

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[24] Judge Ferguson testified:

> . . . I wish to call the committee's attention to a controversy which has swirled about the Court of Military Appeals almost since its inception. That is the question whether it, as an appellate court, has the authority to entertain a writ of error in the nature of coram nobis and correct certain fundamental injustices in a court-martial which either could not be or were not found by it in the normal course of review. The United States has consistently denied we had such authority, except for a recent instance in which the accused had sought such a writ from the local Federal courts. Then, the Government urged the case properly belonged to us on a similar writ. The local judge so ruled, in effect, but when the case came before us, the Government switched its position and argued we did not have the authority to entertain it. As this case is still sub judice, I will not comment further on it, but it indicates a problem which should be resolved and I think it could be most suitably ended by an additional amendment to article 66 of the code to provide expressly that: "The Court of Military Appeals shall have power to entertain a writ of error in the nature of coram nobis in all court-martial cases to which its appellate jurisdiction originally extended and grant such relief to the petitioner as it may deem required.

Appeals as the "*United States* Court of Military Appeals," Pub. L. No. 90-340, 82 Stat. 178 (1968), and the "Boards of Review" as "Courts of Military Review." Pub. L. No. 90-632, 82 Stat. 1335 (1968). The House report explained:

> There has been some claim that the court, having been put under the Department of Defense for administrative purposes [*see* Art. 141, 10 U.S.C. § 941], is in effect an administrative agency. If it had such status, it would not be able to question any of the provisions of the Manual for Courts-Martial since the manual had been promulgated by Presidential order. The bill makes clear that the Court of Military Appeals is a court and does have the power to question any provision of the manual or any executive regulation or action as freely as though it were a court constituted under Article III of the Constitution.

H. Rep. No. 1480, 90th Cong., 2d Sess. 2 (1968).

Powerful confirmation that the appellate military courts possess All Writs Act powers—and specifically the power to grant post-finality coram nobis relief—came in 1982 from the Department of Defense. For some time there had been a question as to whether the Boards for Correction of Military Records had the power to review and modify the findings and sentences of courts-martial. The 1966 Senate committees' summary of military justice collateral remedies, *see* p. 49 *supra*, had noted the issue. *See also Correction of Military Records*, 41 Op. Att'y Gen. 49 (1949) (correction boards can correct error or remove injustice in court-martial records despite AW 50(h)

finality provision). The Department therefore proposed legislation that would, in addition to enacting § 1259, make clear that those boards lack power to reverse court-martial findings and sentences and limit their authority over sentences to the provision of clemency. The letter of transmittal indicates that the drafters believed post-finality review is available within the military justice system. Letter from William H. Taft IV, Gen. Counsel, Dep't of Defense, to Speaker Thomas P. O'Neill, Jr., Aug. 12, 1982, *supra*, at 175.

Mr. Taft, the Department's General Counsel, elaborated on this in testimony before the Senate Armed Services Committee. He explained that eliminating correction board review would not leave litigants without an avenue for post-finality collateral relief. Describing the UCMJ as a "comprehensive system of appellate review and post-conviction relief," he testified that post-finality collateral review, *including coram nobis*, is available from the appellate military courts:

> The amendments will underscore the stature of the Court of Military Appeals and the Courts of Military Review. It would be inconsistent with the dignity and respect that these courts have earned for the military justice system to suggest that their decisions on issues of law could be reversed by an administrative board.
>
> The proposed legislation would make it clear that the BCMRs [correction boards] and DRBs [discharge review boards] have no authority to review the proceedings, findings, or

> sentences of courts-martial. This will have the effect of channeling all appellate proceedings and claims for post-conviction relief into the avenues established for such actions by Congress in the UCMJ.
>
> Pre-UCMJ cases may be reviewed on issues of law by The Judge Advocate General under Article 69; *post-UCMJ cases that were subject to Court of Military Review jurisdiction may be reviewed by the Courts of Military Review or the Court of Military Appeals on writs of coram nobis;* post-UCMJ cases that were not subject to UCMJ jurisdiction may be reviewed by The Judge Advocate General under Article 69. This will not only eliminate unnecessary duplication of procedures, it will also ensure that post-conviction challenges by the accused will be heard in a judicial forum.[25]

Among the remedies that would remain available under the proposed legislation was *precisely the one Mr. Denedo invoked.* Moreover, elimination of the administrative remedies was premised on the fact that coram nobis and other collateral remedies remained available from the appellate military courts.

The Senate report expressly adopted the Department's view:

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[25] *The Military Justice Act of 1982, Hearings on S. 2521 Before the Subcomm. on Manpower & Personnel, Sen. Comm. on Armed Services,* 97th Cong., 2d Sess. 36 (1982) (prepared statement of William H. Taft, IV, Gen. Counsel, Dep't of Defense) (emphasis added).

> The proposed legislation would make it clear that with respect to cases tried after May 4, 1950, the BCMRs and DRBs have no authority to modify, as a matter of law, findings and sentences of courts-martial. This will have the effect of channeling all appellate proceedings and claims for post-conviction relief into the judicial forums established for such actions by Congress in the UCMJ.

S. Rep. No. 98-53, 98th Cong., 1st Sess. 36 (1983).

Congress passed the measure and President Reagan signed it. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

Having cited Mr. Taft's statement for what it implies on a different point (26 n.5), the government cannot be heard to dispute the position he set forth directly on the precise issue presented here: the availability of post-finality coram nobis relief.

3. Court and Judge Advocates General rule-making on coram nobis

Both the Court of Appeals and the Judge Advocates General recognize that the appellate military courts can grant writs of error coram nobis without a time limit.

The Court of Appeals has a Rules Advisory Committee. In 1994, the committee, which includes representatives from the services, Department of Justice, law schools, and private practice, *see* C.A.A.F.R. 45(a), proposed a change to the court's Rule 4(b), concerning the court's jurisdiction to entertain extraor-

dinary writ petitions. The change made clear that, while the court has original writ jurisdiction, practitioners should, absent good cause, first seek relief in the intermediate court. *See also* R.C.M. 1204 (Discussion). The committee also proposed a change to Rule 19, which prescribes a time limit for petitions for extraordinary relief. That change deleted, for coram nobis, the 20-day limit that had applied to extraordinary writ petitions other than those seeking habeas corpus. C.M.A.R. 19(d), 38 M.J. LXXIII, LXXVII (1994).

The committee noted "that only petitions for writ of habeas corpus are expressly exempted from the 20-day time limit established by Rule 19(d)," but suggested that "the failure also to exempt petitions for writ of *error coram nobis* may be due to an oversight by the drafters of Rule 19." 60 FED. REG. 4893 (1995). The committee explained that

> [t]he All Writs Act, 28 USC 1651(a), which is the basis for the Court's extraordinary relief jurisdiction, establishes no fixed time limit for applications for writs of *error coram nobis*. *See United States v. Morgan*, 346 U.S. 502 (1954) (writ available after sentence already served when the conviction was sought to be used to enhance sentence on a later conviction).
>
> When Rule 19 was drafted, the Court of Appeals for the Armed Forces had not previously suggested any time limit for the filing of a petition for writ of error coram nobis. *See Del Prado v. United States*, 23 USCMA 132,

48 CMR 748, 749 (1974) (citing *United States v. Morgan, supra*).

The committee voted unanimously for the proposed change to Rule 4. The sole dissenter with respect to the proposed change to Rule 19 was from the Air Force. The Court of Appeals published the proposed changes, 60 FED. REG. 4893 (1995), and ultimately adopted them. 43 M.J. CLXXVII (1995).

Similarly, a committee composed of representatives of the service courts proposed uniform rules for the service courts. These were "submitted to the respective Judge Advocate Generals for approval and promulgation pursuant to Article 66(f) of the [UCMJ]." 60 FED. REG. 64031 (1995). Those rules provide that a service court "may, in its discretion, entertain . . . writs of error coram nobis" without time limit. 32 C.F.R. §§ 150.2(b), 150.20.[26]

4. Stare decisis and congressional ratification

Stare decisis and congressional ratification militate against the government's position.

"Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation,

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[26] The Air Force Court's local rules also provide for coram nobis but, uniquely among the service courts, purport to impose a 20-day limit. A.F.C.C.A.R. 2(b), 20.1(a). We believe that limit is unlawful. *See Morgan*; *United States v. Gilley*, 59 M.J. 245, 247 (C.A.A.F. 2004) (invalidating Air Force Court's local rule requiring counsel to submit briefs in a remanded case within shorter period than prescribed by service courts' uniform rules).

the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Congress has known for decades that the appellate military courts interpret their statutes to permit collateral review, including coram nobis petitions. At worst, Congress has acquiesced in their interpretation, *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 752 (2008), and at best, has reinforced it. When Congress passed the Military Justice Act of 1983—with Mr. Taft's testimony in mind—it "emphasize[] that it does not intend to displace the Court of Military Appeals as the primary interpreter of military law" and that that court would remain "the principle source of authoritative interpretations of the UCMJ." S. Rep. No. 98-53, 98th Cong., 1st Sess. 10-11 (1983).

Congress is presumed to know what the courts decide. But there is no need to rely on a presumption in connection with congressional awareness of the appellate military courts' exercise of All Writs Act authority. Judge Ferguson and Mr. Taft told them about it. In addition, Congress has required the submission of annual reports. Art. 146, UCMJ, 10 U.S.C. § 946. Those reports record the extraordinary writ activity of the Court of Appeals. *See, e.g.*, 38 M.J. CXI, CXXXIII (1991-92).

CONCLUSION

For the foregoing reasons, the petition should be dismissed as improvidently granted. Alternatively, the decision below should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 08-267

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE UNITED STATES

The divided Court of Appeals for the Armed Forces (CAAF) held that military appellate courts possess open-ended jurisdiction under the All Writs Act, 28 U.S.C. 1651, to hear a coram nobis petition attacking the merits of a court-martial judgment that has long since become final. Three bedrock principles require reversal of that decision.

First, the jurisdiction of military appellate courts, as Article I courts, is strictly limited to the bases of jurisdiction expressly conferred upon them by statute. Gov't Br. 16 & n.2; see, *e.g.*, *Clinton* v. *Goldsmith*, 526 U.S. 529, 533-534 (1999). Second, because the All Writs Act is not an independent grant of jurisdiction, the Uniform Code of Military Justice (UCMJ) itself must provide a basis of jurisdiction that a writ of coram nobis can aid. Gov't Br. 13-16; see *Goldsmith*, 526 U.S. at 534-535. Third, none of the jurisdiction conferred in the UCMJ is aided by a coram nobis petition of a former service member whose conviction is final

and whose discharge has been executed. Gov't Br. 17-21; see 10 U.S.C. 866-876.

Respondent does not refute any of the three propositions set forth above. Rather, as a threshold matter, respondent repeats his objection to this Court's authority under 28 U.S.C. 1259(4) to hear this case. There can be no serious question, however, that the CAAF granted respondent meaningful "relief," as required by Section 1259(4), by reversing the Navy-Marine Corps Criminal Court of Appeals (N-MCCA) decision denying his coram nobis petition and by remanding for further proceedings. Respondent raises no new legal or factual ground to support dismissal of the writ of certiorari as improvidently granted.

As to the question presented, respondent contends that because the military appellate courts *once* possessed jurisdiction under the UCMJ to review his court-martial conviction, those courts have continuing appellate jurisdiction to conduct that review via the All Writs Act *at any time*. That repeats the mistake that the CAAF made and that this Court corrected in *Goldsmith*. Such a result would undermine binding Article 76 finality and would eviscerate Congress's carefully crafted limits on collateral review within the military justice system. 10 U.S.C. 876. That includes limits on coram nobis relief that, according to unrebutted legislative history, Congress subsumed within Article 73's new-trial provision. 10 U.S.C. 873.

Respondent also attempts to circumvent the military appellate courts' lack of constitutional authority to adjudicate the claims of a former service member no longer subject to the UCMJ. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); U.S. Const. Art. I, § 8, Cl. 14. Respondent relies on inapposite cases involving an intervening discharge during *direct* appellate review. And respondent is incorrect that the government asserts the

power to retry a former service member by court-martial after reversal of his final conviction on collateral review, when that service member is beyond his enlistment period and no longer in military custody.

In any event, coram nobis review is neither necessary nor appropriate here. Respondent does not dispute that, as a general matter, several alternative avenues exist for seeking the relief he now seeks. His untimeliness (justifiable or not) in seeking those remedies in this case cannot invest the military courts with jurisdiction that they do not otherwise possess. Doing so would create burdens on the military justice system that Congress did not design it to bear and that it has never borne in its 200-year history until the CAAF's modern departures.

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. 1259(4)

Section 1259(4) of Title 28 provides that this Court may review "[d]ecisions" of the CAAF in four classes of "[c]ases," including ones not otherwise specified "in which the [CAAF] granted relief." Respondent contends (Br. 6-13) that, although the CAAF reversed the N-MCCA's denial of his claim, the CAAF did not "grant[] relief" because it remanded for further fact-finding rather than grant his claim outright. He urges that the writ of certiorari should thus be dismissed as improvidently granted. *Id.* at 13.

Respondent made the same jurisdictional-defect argument in his opposition to the petition for certiorari (Br. 4-6), and the government responded to it in its reply (Br. 2-4). The Court nevertheless granted review, without directing the parties to address this Court's jurisdiction. See, *e.g.*, *Howell* v. *Mississippi*, 542 U.S. 936 (2004) (granting certiorari and directing parties to brief

additional issue—raised in the opposition to certiorari —of Court's jurisdiction). And respondent presents no new factual or legal development to support reconsideration of the Court's grant.

In any event, respondent's interpretation of 28 U.S.C. 1259(4) is without merit. As previously explained (Cert. Reply Br. 2-3), Section 1259(4) requires only "relief," not "complete relief" or "ultimate relief on the merits." The CAAF plainly "granted relief" to respondent by affirming the N-MCCA's jurisdiction to hear his petition, reversing the N-MCCA's denial of his claim on the merits, and remanding for further factfinding on that claim. Pet. App. 1a-32a. In both ordinary and legal parlance, respondent won his appeal; it was the government that (unsuccessfully) sought reconsideration of the CAAF's decision. *Id.* at 61a. While respondent may have preferred the CAAF also to decide the merits of his claim in his favor (notwithstanding the lack of any factual development), the CAAF still granted him meaningful relief. See, *e.g.*, *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (per curiam) (recognizing that "effectual relief" can consist of a "partial remedy" in a party's favor). Indeed, it is common for this Court to reverse a judgment and remand for further factual development, thereby granting "relief," if not the ultimate relief that the party may seek. See, *e.g.*, *Panetti* v. *Quarterman*, 127 S. Ct. 2842, 2863 (2007).

Respondent's cramped conception of "relief" ignores the CAAF's role as an appellate tribunal. The CAAF itself has recognized that a reversal and remand for further proceedings is a common and important form of relief for a party that has lost in a lower court. See *United States* v. *Ginn*, 47 M.J. 236, 238 (1997) (noting that "appellant has not averred or shown sufficient prej-

udice to now warrant a factfinding hearing or any *other* appellate relief") (emphasis added). Because the CAAF lacks factfinding authority (see 10 U.S.C. 867(c)), a remand for a factual hearing is often the only remedy it can provide. That will be true not only in cases such as this one where the lower court has not resolved a factual dispute pertinent to the relief sought, but in any case where a petitioner invokes original jurisdiction in the CAAF to secure coram nobis relief (see C.A.A.F. R. 4(b)(1)).[1]

Respondent further contends that review is available in this Court under Section 1259—including but not limited to Section 1259(4)—only if the CAAF decides a case "on its merits," which he construes to mean a plenary disposition of the moving party's underlying claim. Resp. Br. 7 (quoting Eugene Gressman et al., *Supreme Court Practice* 128 (9th ed. 2007) (*Supreme Court Practice*)).[2] But the structure of Section 1259 negates such

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[1] The cases on which respondent relies (Br. 8) for his construction of the term "relief" in Section 1259(4) are inapposite. The Seventh Circuit's decision in *Health Cost Controls of Illinois, Inc.* v. *Washington*, 187 F.3d 703, 706-707 (1999), cert. denied, 528 U.S. 1136 (2000), concerned the distinct question whether the grant of summary judgment by a district court constitutes the entry of a "judgment" for the purpose of appellate jurisdiction. The remaining cases cited by respondent address primarily the "prevailing party" requirement for fee shifting—a very different purpose.

[2] Read in context, it is apparent that the cited treatise equates a decision in a case "on its merits" in the CAAF with any decision following a grant of review by the CAAF: "if the [CAAF] does not grant a petition for review, *and thus does not decide a case on its merits*, the Supreme Court has no jurisdiction to review that inaction by way of certiorari." *Supreme Court Practice* 128 (emphasis added). The treatise thus does not suggest that this Court's jurisdiction attaches under Section 1259 only to cases in which the CAAF grants a petitioner the ultimate relief he seeks.

a construction. Section 1259(1) authorizes certiorari jurisdiction in capital cases "reviewed by" the CAAF under Article 67(a)(1); Section 1259(2) authorizes certiorari jurisdiction in cases "certified to" the CAAF at the direction of the Judge Advocate General (JAG) under Article 67(a)(2); and Section 1259(3) authorizes certiorari jurisdiction in cases in which the CAAF "granted a petition for review" under Article 67(a)(3). As previously observed, in each of those categories, the remedy afforded the prevailing party upon the exercise of the CAAF's jurisdiction may entail a remand for further proceedings. Cert. Reply Br. 4 (collecting cases). Yet nothing in Section 1259 suggests that a remand or other partial relief in the disposition of such cases forecloses certiorari review. There is no reason to suppose that Congress contemplated the more restrictive rule suggested by respondent with respect to the remaining CAAF decisions covered by Section 1259(4).[3]

Respondent's juxtaposition (Br. 12) of 28 U.S.C. 1259 against 28 U.S.C. 1254(1) does not support his argument either. While it is true that Section 1254(1) permits certiorari even *before* "rendition of a judgment" of a federal court of appeals, while Section 1259 does not with respect to the CAAF, there is no question here that the CAAF has issued a decision. The more salient compari-

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[3] Contrary to respondent's contention (Br. 12), the fact that Section 1259(3) requires the CAAF to have "granted a petition for *review*" whereas Section 1259(4) requires the CAAF to have "granted *relief*" does not mean that "relief" entails plenary disposition of the underlying claim (emphases added). It simply means that in cases involving petitions for extraordinary relief subject to 1259(4), certiorari jurisdiction attaches only when the CAAF grants some measure of relief—*i.e.*, something other than dismissal or denial—even if not the ultimate remedy sought in the petition.

son is that of Section 1259—which authorizes certiorari review of "[d]ecisions" of the CAAF—to Section 1257—which authorizes certiorari review only of "[f]inal judgments" of state courts. That textual distinction defeats respondent's suggestion (Br. 7) that Section 1259 imposes a "final judgment" requirement. In any event, even if a "final judgment" requirement applied, it would not pose a bar to review in this case given the distinct and antecedent nature of the issue on which certiorari was granted and given the fact that this Court's review may well be unavailable following remand. See, *e.g.*, *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 557-558 (1963) (according finality despite remand for trial on the merits because venue issue was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action"); *Kansas* v. *Marsh*, 548 U.S. 163, 167 (2006) (according finality despite remand for new trial because the State would have no later opportunity to seek review of the federal issue).[4]

Congress enacted Section 1259 in part to afford the government "judicial recourse from adverse decisions" issued by the CAAF. See H.R. Rep. No. 549, 98th Cong., 1st Sess. 16 (1983). Respondent's construction of the term "relief" as employed in Section 1259(4) would insulate CAAF decisions from this Court's review where the CAAF has overextended its jurisdiction but withheld final relief on the merits. Particularly when an asserted jurisdictional error results in a remand for further pro-

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[4] As respondent appears to acknowledge (Br. 13 n.5), if the N-MCCA denies respondent relief on the merits, then the CAAF could deny further review in its discretion (C.A.A.F. R. 4(b)(2)) or, even if it took the case, affirm the denial of relief. Either way, Section 1259 would provide the government no basis to seek this Court's review.

ceedings that, if the government is correct, should never transpire, respondent's position would frustrate an important legislative purpose.

II. THE MILITARY APPELLATE COURTS LACK JURISDICTION TO ADJUDICATE A FORMER SERVICE MEMBER'S CORAM NOBIS CHALLENGE TO THE MERITS OF HIS FINAL COURT-MARTIAL CONVICTION

A. Coram Nobis Review Of A Final Court-Martial Conviction Does Not "Aid" Any Existing Jurisdiction Of A Military Appellate Court

*1. Respondent relies on the CAAF's pre-*Goldsmith *conception of writ jurisdiction rejected by this Court*

This Court's decision in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), held that the All Writs Act "confine[s] the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction" and "does not enlarge that jurisdiction." *Id.* at 534-535 (quoting 28 U.S.C. 1651(a)). Respondent concedes (Br. 14, 16) that, as a result, the military courts must have an independent basis of jurisdiction to entertain his petition for extraordinary relief.

Despite that concession, respondent implicitly relies on the CAAF's flawed, pre-*Goldsmith* conception of All Writs Act jurisdiction. Respondent premises (Br. 14) his present assertion of military appellate court jurisdiction on the fact that, nine years ago, his case on direct appeal "had been reviewed and affirmed by the Navy Court" subject, *at that time*, to CAAF review under the UCMJ. To support the untenable claim that the All Writs Act could "aid" the military appellate courts' *current* jurisdiction because they had possessed jurisdiction (on direct appeal) in the past, respondent argues (Br. 16) that *Goldsmith*'s reference (526 U.S. at 534-535) to "ex-

isting statutory jurisdiction" lacks any temporal dimension. But that cannot be squared with the *Goldsmith* Court's ensuing explanation that "there is no source of *continuing* jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Id.* at 536 (emphasis added).

Respondent repeats the mistake of the CAAF's decision below and in *Goldsmith*, where this Court held that "the CAAF spoke too expansively when it held itself to be 'empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in [the CAAF] after review in the intermediate court." 526 U.S. at 536-537. The CAAF is not "a plenary administrator even of criminal judgments it has affirmed." *Id.* at 536. This Court thus made clear that the military appellate courts' jurisdiction under the UCMJ to review the findings and sentence of a court-martial does not afford those courts an independent source of *perpetual* jurisdiction over the case.[5]

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[5] Respondent (Br. 15-16) and his amici (Br. of Law Professors 16-17; Br. of Former JAGs et al. 21) alternatively argue that *Goldsmith* does not control because that case precluded the CAAF from employing the All Writs Act to correct an executive action. As explained above and in our opening brief (Br. 14-15), the *Goldsmith* Court did not simply reverse the CAAF on that narrow ground; it rejected the broader proposition that the CAAF possessed continuing jurisdiction under the All Writs Act long after it has lost jurisdiction under the UCMJ to alter the findings and sentence of a court-martial.

2. *The UCMJ does not confer jurisdiction to hear coram nobis challenges to final court-martial convictions*

a. As explained in our opening brief (at 16-18), the military appellate courts are Article I courts and thus strictly limited to the bases of jurisdiction conferred by Congress in the UCMJ. See *Goldsmith*, 526 U.S. at 533-534. Pursuant to Articles 66 and 67, the UCMJ provides a "narrowly circumscribed" regime for military appellate court review: direct, record-based review of court martial convictions and sentences. *Id.* at 535; 10 U.S.C. 866, 867. Respondent does not (and cannot) point to anything in the UCMJ conferring jurisdiction on either the CAAF or the courts of criminal appeals to entertain collateral attacks on the merits of final court-martial judgments. See Resp. Br. 18 ("*Goldsmith* cites nothing in the UCMJ for the proposition that an appellate military court may grant extraordinary relief in a final case.").

Instead, respondent contends that Articles 66(f) and 144—which respectively grant authority to the JAG to "prescribe uniform rules of procedure for Courts of Criminal Appeals" (10 U.S.C. 866(f)) and to the CAAF to "prescribe its rules of procedure" (10 U.S.C. 944)—enable the military courts, absent any statutorily defined procedure for collateral review, to determine the scope of collateral review "through the common law process and exercise of those rulemaking powers." Resp. Br. 27. But the implication that military courts have power to expand the scope of their own jurisdiction through procedural rulemaking powers subverts basic principles of Article I court jurisdiction. Gov't Br. 16 & n.2; see C.A.A.F. R. 4(c) ("These Rules shall not be construed to extend or to limit the jurisdiction of the [CAAF] as established by law."); Crim. App. R. 2(c) (codified at 32

C.F.R. 150.2(c)) ("Nothing in this part shall be construed to extend or limit the jurisdiction of the Courts of Criminal Appeals as established by law.").

Article 76 finality—attaching to final court-martial judgments ordered into execution, 10 U.S.C. 876—poses an additional, affirmative restraint on collateral military review. See Gov't Br. 18-19. As the CAAF did below (Pet. App. 9a), respondent attempts to evade that bar by labeling it merely "prudential." Resp. Br. 38-39 (citing *Schlesinger* v. *Councilman*, 420 U.S. 738, 749 (1975)). But *Councilman* addressed Article 76's effect on the availability of collateral review in *Article III* courts, and the government agrees that Article 76 does not bar such review outside the *Article I* military court system (see Gov't Br. 20-21), where separate statutory bases of jurisdiction exist. *E.g.*, 28 U.S.C. 2241. Indeed, *Councilman* itself recognized that "the finality clause" of the predecessor to Article 76 "describ[es] the terminal point for proceedings *within the court-martial system*." 420 U.S. at 750 (emphasis added) (quoting *Gusik* v. *Schilder*, 340 U.S. 128, 132 (1950)). Contrary to respondent's contention (at 41-43), and as explained in our opening brief (at 21), *Councilman*'s citation of the CAAF's decision in *Frischholz* for the unobjectionable proposition that Article 76 finality is not a complete bar to collateral review "in an appropriate forum" (420 U.S. at 753 n.26) in no way suggests approval of *Frischholz*'s broader view that a writ of error coram nobis is available in military courts to attack final court-martial convictions—an issue that this Court had no occasion to consider.[6]

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[6] Respondent notes (Br. 17-18) that this Court in *Goldsmith* did not rely on Article 76 finality to preclude the exercise of the CAAF's jurisdiction under the All Writs Act. But that is unsurprising given that Goldsmith's challenge to a separate administrative action did not

Likewise, this Court's decision in *United States* v. *Morgan*, 346 U.S. 502 (1954), does not bear on the availability of coram nobis in the Article I military courts; rather, it dealt with the availability of the writ in an Article III district court. The many distinguishing features of the military justice system—including the statutorily limited scope of appellate review (see Articles 66 and 67), the unique finality of executed military orders (see Article 76), and the lack of standing trial courts (see Gov't Br. 36-39)—render *Morgan* inapplicable here.

As explained in our opening brief (at 19-20, 25-26), the UCMJ provides a single mechanism (beyond Secretarial or Presidential action) for collateral review of a final court-martial conviction and sentence within the military justice system: Article 73's petition for a new trial. 10 U.S.C. 873, 876. An express exception to Article 76 finality, Article 73 permits an accused to petition the JAG for a new trial on the ground of newly discovered evidence or fraud on the court within two years after approval by the convening authority of a court-martial sentence. *Ibid.* Respondent offers no response to the concern that his sweeping view of the availability of collateral review in the military courts would eviscerate Congress's limits on such review and render Article 73 both toothless and redundant.[7]

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squarely implicate Article 76 finality; indeed, the government did not raise Article 76 as a bar in that case. Rather, *Goldsmith* was properly resolved on the ground that the CAAF lacked any independent jurisdictional basis over the challenge.

[7] Unlike Article 73, Article 69(b) (pertaining to JAG review in cases not reviewed under Article 66) provides an exception for "good cause for failure to file within" the two-year time limit. Compare 10 U.S.C. 869(b), with 10 U.S.C. 873. Therefore, when Congress intended there

b. Respondent's response to Article 73's legislative history on the precise issue now before the Court is equally unsatisfying. As explained in our opening brief, Felix Larkin of the Department of Defense testified before Congress before its enactment that Article 73 was intended specifically to supplant the common law writ of error of coram nobis and integrate it into the new-trial petition. Gov't Br. 25-26 (quoting *Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1211 (1949) (*1949 UCMJ Hearings*)). While the probative nature of such comments might be subject to debate if made by just any "departmental witness[]" (Resp. Br. 29), Mr. Larkin served as the chairman of the seven-month working group charged with drafting the UCMJ. See 95 Cong. Rec. 5719 (1949). He thus spoke authoritatively when explaining that "[w]hat *we* did was to combine what amounts to a writ of error coram nobis with the motion for a new trial on newly discovered evidence." *1949 UCMJ Hearings* 1211 (emphasis added); see *Carcieri* v. *Salazar*, No. 07-526 (Feb. 24, 2009), slip op. 10 n.5 (noting view of statute's "principal author"); 2A Norman J. Singer, *Statutes and Statutory Construction* § 48:10, at 587 (7th ed. 2007) ("Statements of the draftsman of a proposed bill concerning his understanding of its nature and effect, made at the committee hearings, have been accepted in federal courts as indicative of legislative intent. If the bill * * * remains unchanged it is reasonably assumed that the legislature adopted the view of the draftsman.") (collecting cases).

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to be an exception to time constraints to post-conviction review under the UCMJ, it so stated.

That Article 73 is not coterminous in breadth with the common law writ of coram nobis does not make Mr. Larkin's considered testimony "superficial and incorrect." Resp. Br. 29, 33 & n.15. The point is that the ill-defined common law writ was tailored in Article 73 to comport to the unique demands of the military justice system. The testimony leaves no doubt that the drafters of Article 73 perceived the new-trial motion as the exclusive vehicle, *within the military court system*, for making post-finality challenges to court-martial convictions. See *Burns* v. *Wilson*, 346 U.S. 137, 141 (1953) (noting, in reference to Article 73, "Congress has provided a special post-conviction remedy *within the military establishment*, apart from ordinary appellate review") (emphasis added).

As explained in our opening brief (at 22-25), the UCMJ's careful limits on collateral review within the military justice system are consistent with historical practice since the Nation's founding. Respondent does not cite a single instance before 1966 of a military court recognizing jurisdiction to adjudicate a collateral attack (let alone via a writ of error coram nobis) of a final court-martial conviction (Resp. Br. 13 & n.6), and the government is not aware of one before then. Although this Court has recognized such practice in *civilian* courts since the early nineteenth century (*Councilman*, 420 U.S. at 747-748), there is no such historical practice in the military courts. To the contrary, the UCMJ's provision for direct appellate review within the criminal courts of appeal and the CAAF, along with Article 73's new-trial provision, created a highwater mark of process within the military justice system. Accordingly, the CAAF's relatively recent but dramatic expansion of military-court jurisdiction—untethered to the text or

history of the UCMJ—not only contravenes basic principles of limited Article I court jurisdiction, but also belies any claim to "settled law" (Resp. Br. 44).

c. Nor is there validity to respondent's claim that the Executive and Legislative Branches have endorsed the CAAF's post-1966 approach. Although the government once suggested before a district court that a coram nobis petition challenging a final court-martial conviction should be brought in a military court instead, it returned to the position it had taken before then (and since) when that matter arose in the Court of Military Appeals (CMA) (predecessor to the CAAF): the military court "has no power 'to entertain and consider' the accused's application because it is outside the scope of jurisdiction conferred * * * by Article 67 and prohibited by Article 76." *United States* v. *Frischholz*, 36 C.M.R. 306, 307 (C.M.A. 1966) (internal citation omitted); see Resp. Br. 49 n.24 ("The United States has consistently denied [the CMA] had such authority [to entertain a writ of error coram nobis], except for a recent instance [referring to the district court litigation in *Frischholz*].") (quoting *Military Justice: Joint Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess. 303 (1966) (*1966 Joint Hearings*) (testimony of Judge Homer Ferguson, CMA)). In any event, the Executive's position in *Goldsmith*, reiterated in this case, resolves any doubt about its considered view. See Gov't Br. 17-18, *Goldsmith*, *supra* (No. 98-347) (arguing that the CAAF "may issue a writ under 28 U.S.C. 1651 only when the writ is issued 'in aid of' [its] existing or potential appellate jurisdiction," such that the All Writs Act does not provide the CAAF a "free-floating continuous source of jurisdic-

tion"); see also Gov't Jurisdictional Br. 7, *Councilman*, *supra* (No. 73-662) (Congress intended Article III-court collateral review to be "the sole exception to the finality of actions within the military court system").[8]

Respondent's claim (at 48-56) of congressional ratification by acquiescence is equally unfounded. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation.") (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (internal quotation marks omitted; brackets in original)). The congressional testimony of Judge Ferguson—a principal source for respondent's argument—actually undercuts it. Judge Ferguson proposed an amendment to Article 66 of the UCMJ that

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[8] Contrary to respondent's contention (Br. 47-48), the government's arguments in a pair of lower court cases after the CMA's decision in *Frischholz* but before *Goldsmith* establish nothing more than an acknowledgment of military-court precedent since 1966. The same is true for the 1982 testimony of the Department of Defense's General Counsel referring to the channeling of "claims for post-conviction relief into the avenues established for such actions by Congress in the UCMJ." Resp. Br. 51-52 (quoting *The Military Justice Act of 1982: Hearings Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2d Sess. 36 (1982) (statement of William H. Taft, IV)). Likewise, the fact that rules advisory committees proposed and the CAAF and JAGs for the Courts of Criminal Appeals ultimately adopted procedural rules (predating *Goldsmith*) for extraordinary writ petitions, including coram nobis (Resp. Br. 53-55), simply reflects implementation of those courts' own precedent—even if incorrect. Compare, *e.g.*, C.A.A.F. Rule 4(b) (permitting original jurisdiction over extraordinary writ petitions), with *Goldsmith*, 526 U.S. at 537 n.10 (CAAF "was simply wrong when it treated itself as a court of original jurisdiction.").

would have conferred upon the CMA the "power to entertain a writ of error in the nature of coram nobis in all court-martial cases to which its appellate jurisdiction originally extended and grant such relief to the petitioner as it may deem required." *1966 Joint Hearings* 303. Yet when Congress enacted extensive amendments to the UCMJ two years later, including an increased role for the military appellate courts, it did not include the proposed amendment. See Military Justice Act of 1968, Pub. L. No. 90-632, § 2, 82 Stat. 1341-1342. Nor has Congress done so since then,[9] even in the wake of this Court's decision in *Goldsmith* rejecting the CAAF's broad view. If anything, the legislative record thus suggests congressional *rejection* of the notion that military appellate courts should exercise coram nobis jurisdiction.

d. In our opening brief (at 27-29), we acknowledged that military appellate courts are empowered to issue relief under the All Writs Act in limited circumstances. Respondent's attempt (Br. 18-21) to characterize that established proposition as "contradict[ing]" the argument against limitless continuing military jurisdiction to challenge final court-martial convictions does not withstand scrutiny.

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[9] Before and after the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, Congress declined to adopt related recommendations to enlarge the jurisdiction of the military appellate courts, *e.g.*, conferral of Article III status on the CAAF and authorization of coram nobis jurisdiction. See 1 *Advisory Commission Report: Military Justice Act of 1983*, at 11 (recommending Article III status for CAAF), 73 (statement of Chief Judge Albert B. Fletcher, Jr., CMA, proposing coram nobis power) (submitted to Congress on Dec. 14, 1984) <http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf> (visited Mar. 10, 2009).

First, the most significant category consists of cases "which may ultimately be reviewed by that [military appellate] court," *i.e.*, cases in which no final court-martial conviction and sentence has arisen yet. *Noyd* v. *Bond*, 395 U.S. 683, 695 n.7 (1969). That may occur, for example, where the accused seeks release before completion of the appellate process or where a party seeks interlocutory review of a ruling during a court-martial proceeding. See, *e.g.*, *United States* v. *Dearing*, 63 M.J. 478 (C.A.A.F. 2006) (granting writ of mandamus for accused's release despite prior remand for rehearing because time served exceeded maximum confinement on remaining charge); *Hall* v. *Thwing*, 30 M.J. 583 (A.C.M.R. 1990) (granting writ of mandamus for dismissal of charges for speedy-trial violation). Such adjudications are reasonably considered "in aid of" military appellate jurisdiction and occur before Article 76 finality attaches.

Second, military court authority to *compel adherence* to a final judgment says nothing about the authority to *alter or overturn* that judgment; only the latter (invoked by respondent's coram nobis petition) threatens to undermine the finality of an approved court-martial judgment. Compelling adherence to a judgment *preserves* its finality.[10]

Third, contrary to respondent's assertion (Br. 18), the government made no "concession[]" as to the author-

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[10] Moreover, a convening authority's order of punishment greater than that authorized by the military courts is not an "action taken pursuant to th[e] proceedings" of a court-martial and thus is not itself entitled to Article 76 finality. 10 U.S.C. 876; cf. *United States* v. *Stevens*, 27 C.M.R. 491, 492 (C.M.A. 1959) ("purported actions of the convening authority in the case were contrary to the Order of this court and void and of no effect").

ity of military appellate courts to hear collateral challenges to a military judgment on the basis that the tribunal that entered the judgment had lacked jurisdiction. Rather, given that the CAAF has recognized such authority (over the government's objection), the government stated (Br. 29 & n.7)—"assuming *arguendo*" the authority existed—that its exercise could reasonably be characterized as "in aid of" determining jurisdiction, thereby reinforcing rather than trammeling upon the UCMJ's statutorily defined limits. In any event, such authority does not necessarily implicate the same finality concerns because a traditional jurisdictional defect (*i.e.*, an improperly constituted tribunal or lack of jurisdiction over the offense or offender) renders the court-martial proceeding void *ab initio* under military law. See, *e.g.*, *McClaughry* v. *Deming*, 186 U.S. 49, 65 (1902) (jurisdictional defect renders court-martial "in law no court"); *United States* v. *Wheeler*, 28 C.M.R. 212, 215 (C.M.A. 1959) ("If the court lacks jurisdiction or if the charges fail to allege any offense under the code, the proceedings are a nullity.") (quoting *Manual for Courts-Martial, United States* ¶ 68b(1) (1951)); R. for Courts-Martial 201(b)(5) (R.C.M.), note ("The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect.").[11]

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[11] That Article III courts in some contexts have interpreted "jurisdictional" defects to encompass certain constitutional defects is beside the point. See Resp. Br. 21-22, 30. Those decisions, arising in a different setting, do not authorize Article I military courts, which lack a basis of jurisdiction, to exercise a similarly broad scope of collateral review. In any event, military law traditionally has reflected a narrower conception of jurisdictional defects. See, *e.g.*, *Wright* v. *United States*, 2 M.J. 9, 10 (C.M.A. 1976) (counsel error "is not of jurisdictional magnitude"); R.C.M. 201(a)(1), discussion note ("'Jurisdiction' means the power to hear a case and to render a legally competent decision."); R.C.M. 201(b)

3. *The military courts also lack jurisdiction because respondent is a former service member no longer subject to the UCMJ*

In our opening brief (at 29-32), we argued that the military appellate courts lacked jurisdiction to hear respondent's coram nobis petition for the independent reason that respondent was no longer a service member subject to the UCMJ. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14-15 (1955); U.S. Const. Art. I, § 8, Cl. 14; 10 U.S.C. 802. That is not an impediment that can be waived by consent. See *McClaughry*, 186 U.S. at 66 (accused's "consent could no more give jurisdiction to the court[-martial], either over the subject-matter or over his person, than if it had been composed of a like number of civilians"); *United States* v. *Meadows*, 13 M.J. 165, 168 n.4 (C.M.A. 1982) ("an accused cannot create court-martial jurisdiction by consent"); cf. R.C.M. 907(b)(1)(A).

Respondent relies (at 23-24) on direct-review cases holding that an intervening discharge does not divest the military courts of jurisdiction to complete the appellate process (including ordering of a retrial). But that line of cases, which the government acknowledged and distinguished (Br. 31 n.8), is limited to facilitating the completion of the statutorily prescribed appellate process. See *Smith* v. *Vanderbush*, 47 M.J. 56, 59 (C.A.A.F. 1997) ("[T]he concept of continuing jurisdiction may be applied *for the limited purpose* of permitting appellate

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(enumerating five traditional "*[r]equisites of court-martial jurisdiction*"); see also *Trials by Courts-Martial: Hearings on S. 5320 Before the Senate Comm. on Military Affairs*, 65th Cong., 3d Sess. 8-9 (1919) (testimony of Brig. Gen. Samuel T. Ansell) (referring to a court-martial that lacked jurisdiction as a proceeding "*coram non judice*," *i.e.*, not in the presence of a judge).

review and execution of the sentence in the case of someone who already was tried and convicted while in a status subject to the UCMJ.") (emphasis added). This case is readily distinguishable, as direct appellate review under the UCMJ was completed nearly a decade ago and respondent's military status was terminated by execution of a bad-conduct discharge soon thereafter.

Contrary to respondent's implication, the government does *not* assert the power to retry by court-martial a discharged service member after the appellate process has run its course—at least after his enlistment period has expired and he is no longer in military custody. See 10 U.S.C. 802. Accordingly, such claimants seeking collateral review would benefit from an unintended windfall: reversal of the conviction (perhaps, as here, through no fault of the government) with no risk of retrial and conviction by another court-martial. That consequence provides another reason why this Court should not permit coram nobis review—often arising long after the enlistment period has expired—within the military justice system.

Although an Article 73 "petition for a new trial may be submitted by the accused * * * regardless whether the accused has been separated from the service" (R.C.M. 1210(b)), that petition is submitted to the JAG (and referred to the military courts for resolution only if the appellate process is pending). Contrary to respondent's suggestion (Br. 24-25), neither the UCMJ nor the Rules of Court-Martial provide that a discharged service member whose enlistment period has expired may be retried by a court-martial if an Article 73 petition were granted. Rather, if such a case were to arise, the military presumably would substitute an administrative discharge for any bad-conduct discharge pursuant to Arti-

cle 75(b). See 10 U.S.C. 875(b) ("the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment"). Accordingly, Article 73 does not undermine the government's denial of military court jurisdiction to hear respondent's coram nobis petition.[12]

B. Coram Nobis Review Of The Merits Of A Final Court-Martial Conviction Is Neither Necessary Nor Appropriate

Even if a military appellate court had jurisdiction to collaterally review the merits of a final court-martial judgment, the court would still lack authority under the All Writs Act to issue the writ of error coram nobis because it is neither "necessary" nor "appropriate." 28 U.S.C. 1651(a); Gov't Br. 32-40. Even assuming that coram nobis remains available in Article III courts in narrow situations that this Court has considered "difficult to conceive" (*Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (citation omitted)), extending that remedy to Article I military courts does not comport with the design of the military justice system.

1. Respondent does not dispute the general availability of several of the alternatives for military and federal court review described in the government's opening

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[12] Respondent also argues (Br. 25 n.10) that, if the government were correct that *Toth* bars a military appellate court from granting collateral relief to a former service member after completion of direct appellate review, the same jurisdictional limitation would also apply to Article III courts and to the Court of Federal Claims. As discussed in the government's opening brief (at 32), that contention is incorrect: the jurisdiction of those courts is not constitutionally confined to persons subject to the UCMJ but rather embraces anyone whose claims fall within the scope of their respective jurisdictions.

brief (at 33-35) for a similarly situated claimant who acts within the various time limits set by Congress. Rather, respondent contends (Br. 28-34) only that he does not (at least no longer) qualify for any of them and that, consequently, this Court should permit him to seek coram nobis relief in the military appellate courts. But respondent's failure (justifiable or not) to pursue any available alternatives does not license Article I military courts to grant relief that exceeds their "narrowly circumscribed" jurisdiction. *Goldsmith*, 526 U.S. at 535. The exhaustion argument made by respondent's amicus (Br. of Law Professors 9-15) fails for a similar reason: while a party must exhaust existing military remedies, that does not justify the judicial creation of new remedies that Congress has not authorized. See Gov't Br. 34-35.

Moreover, in assessing whether collateral relief was "necessary" or "appropriate," the Court in *Goldsmith* did not confine its analysis to whether the particular litigant did or could still avail himself of alternative remedies; rather, it examined whether such remedies were generally available in the relevant class of cases. See 526 U.S. at 537 (discussing "alternative remedies available to *a servicemember*" seeking the type of relief at issue) (emphasis added); *id.* at 537 n.11 (noting availability of habeas corpus review in federal court even though "respondent chose not to challenge his underlying conviction"); *id.* at 537-538 ("administrative bodies in the military, and the federal courts, have the authority to provide administrative or judicial review *of the action* challenged by respondent") (emphasis added); *id.* at 538 n.12 (noting that the military review board was "legislatively authorized to provide the relief sought by respondent" even though "respondent chose to circumvent" it); *ibid.* (finding that his "constitutional objections *could*

have been addressed by the federal courts") (emphasis added); see also Gov't Br. 35.

2. Respondent also attempts (Br. 34) to characterize the government's objection to his pleading as a mere labeling issue. But the government's argument (Br. 36-39 & n.9) is that *neither* coram *nobis* nor coram *vobis* is proper because the court-martial which tried the case has long since dissolved. The lack of a standing trial court not only makes use of those common law writs inconsistent with their historical contours but poses real legal and practical problems. The UCMJ, for example, contains no statutory mechanism for litigating factual issues on collateral review; the military appellate courts thus have ordered the creation of fact-finding tribunals for that purpose on an ad hoc basis. See *United States* v. *DuBay*, 37 C.M.R. 411 (C.M.A. 1967). That "unwieldy and imperfect system," Pet. App. 47a (Ryan, J. dissenting), in turn, diverts a military judge, prosecutorial and defense counsel, and other military personnel—none of whom likely will have had prior involvement in the case—from their primary responsibilities in administering justice and discipline within the armed forces.[13] There

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[13] Respondent notes (Br. 37) that a former service member has no constitutional right to representation by military defense counsel to mount a collateral attack and contends that military counsel was made available to represent him "as a matter of grace." The lack of any *constitutional* right to counsel is beside the point, because Article 70(c)(2) imposes a *statutory* requirement that "[a]ppellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court * * * when the United States is represented by counsel." 10 U.S.C. 870(c)(2). The provision does not distinguish between direct and collateral review (presumably because Congress had not intended collateral review in the first place). And because *DuBay* hearings have been considered court-martial proceedings, Article 27 appears to

is no indication in historical practice, the text of the UCMJ, or its legislative history that Congress intended the military justice system to undertake such burdens. See *Solorio* v. *United States*, 483 U.S. 435, 447 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.").

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the CAAF should be reversed.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General

MARCH 2009

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require appointment of military defense counsel. 10 U.S.C. 827(a)(1) ("Trial counsel and defense counsel shall be detailed for each general and special court-martial."); see *United States* v. *Rodriguez*, 60 M.J. 239, 253-254 (C.A.A.F. 2004).

APPENDIX

28 U.S.C. 1259 provides:

Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 17 2009
OFFICE OF THE CLERK

No. 08-267

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JACOB DENEDO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF OF FORMER JUDGE ADVOCATES GENERAL, MILITARY JUDGES AND SENIOR MILITARY LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT*

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INTEREST OF THE AMICI CURIAE[1]

Amici are retired senior military officers of all branches of the service, including trial judges, appellate judges, and two former Judge Advocates General. They have an interest in the fair administration of military justice and the integrity of the military trial and appellate court system.

Colonel Eileen M. Albertson, USMC (Ret.), served almost thirty years in the Marine Corps, including service for four years as a judge on the U.S. Navy-Marine Corps Court of Military Review (now renamed the U.S. Navy-Marine Corps Court of Criminal Appeals). She also served with the Military Justice Division of the Office of the Judge Advocate General of the Navy reviewing Article 69 and 73 petitions.

Captain Kevin J. Barry, U.S. Coast Guard (Ret.), served as Chief Trial Judge for the U.S. Coast Guard, and as an appellate military judge on the Coast Guard Court of Military Review (now renamed the U.S. Coast Guard Court of Criminal Appeals). He retired

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[1]The parties have consented to the filing of this brief. Copies of their letters have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

from active service in 1990, and for the next fifteen years maintained a private law practice limited to military and veterans cases.

Captain Frank Burnette, USNR (Ret.), served twenty-seven years in the United States Navy, including service as a general court-martial judge. He is currently in private practice focusing on criminal defense work in federal and state courts.

Rear Admiral Donald J. Guter, JAGC, USN (Ret.), was a line officer in the United States Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter was the Navy's Judge Advocate General. He was Dean of Duquesne University School of Law in Pittsburgh, Pennsylvania from August 2005 through December 2008 and now serves as a Professor of Law on the faculty.

Commander Mary T. Hall, USN (Ret.), served seventeen years in the United States Navy, including as a special court-martial judge prior to being certified as a general court-martial judge. She is now a civilian practitioner whose practice is devoted exclusively to military law.

Rear Admiral John D. Hutson, JAGC, USN (Ret.) served twenty-eight years in the

United States Navy, including service as Judge Advocate General of the Navy and Commanding Officer of the Naval Justice School in Newport, Rhode Island. He is now the President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

Colonel J. Wayne Kastl, USAF (Ret.), served twenty-eight years in the United States Air Force, including seven and a half years as a judge on the U.S. Air Force Court of Military Review (now renamed the U.S. Air Force Court of Criminal Appeals). He now practices law in Maryland.

Colonel Calvin Lewis, USA (Ret.), served twenty five years in the United Army, including service as Deputy Commandant and Director of Academics at the U.S. Army Judge Advocate General's School in Charlottesville, Virginia and Chief Circuit Judge, Far East Circuit, South Korea. He currently serves as Associate Dean for Student Affairs and Diversity at the Texas Tech University School of Law.

Lieutenant Colonel Christopher Mathews, USAF (Ret.), served twenty-two years in the United States Air Force, including ten and a half years as a prosecutor, culminating in service as the Air Force's chief prosecutor in the Pacific theatre. He subsequently served as a senior judge on the U.S. Air Force Court of

Criminal Appeals. He now practices law in Nevada.

Col. Richard D. Rosen, USA (Ret.) is an Associate Professor of Law and the Director of the Center for Military Law and Policy at the Texas Tech University School of Law. His assignments during his twenty-six year career as an Army judge advocate included service as Commandant (Dean) of the Judge Advocate General's School, United States Army; Staff Judge Advocate of the III Armored Corps in Fort Hood, Texas; Staff Judge Advocate of the 1st Cavalry Division; and Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff.

Lieutenant Colonel Eric Stone, USMC (Ret.), served twenty-one years in the United States Marine Corps, including as a trial-level military judge and service as a judge on the U.S. Navy-Marine Corps Court of Criminal Appeals. He served as Deputy Director of the Navy-Marine Corps Appellate Defense Division, as Appellate Government Counsel of the Navy-Marine Corps Appellate Government Counsel Division, and as a criminal law advisor to the Judge Advocate General of the United States Navy. He now practices law in the Commonwealth of Virginia.

SUMMARY OF ARGUMENT

The system of military courts established by Congress and existing in their modern form for over half a century is responsible for the fair administration of criminal justice for members of the United States armed forces throughout the world. A long-recognized feature of appellate review in such courts, as in civilian courts, is the power to issue writs necessary or appropriate in aid of their goal of rendering correct, fair and proper judgments. The military courts have over time exercised this power sparingly and for good purpose, and this Court has on two occasions explicitly confirmed their power to do so.

The Government, reversing a position it has taken on previous occasions, but consistent with arguments it has made unsuccessfully before in this Court, seeks to strip the military courts of at least some of their power to grant such relief – although in light of concessions made in its brief, it is less than clear how far the Government's argument extends. None of its arguments supports a reversal of this Court's precedents upholding this jurisdiction. The Government's attempt to deprive the military court system of its power to correct fundamental errors on collateral review is contrary to settled law, based on a misunderstanding of the military court system,

and detrimental to the fair administration of justice.

ARGUMENT

I

MILITARY JUSTICE IN THE UNITED STATES IS A COMPREHENSIVE SYSTEM OF PROCEDURAL AND SUBSTANTIVE CRIMINAL LAW RESPONSIBLE FOR THE FAIR ADMINISTRATION OF JUSTICE TO ALL OF THIS COUNTRY'S SERVICE MEMBERS

Since even before[2] the Constitution granted the Congress power "To make Rules for the Government and Regulation of the land and naval Forces,"[3] criminal jurisdiction over the United States armed forces has been exercised by a self-contained, largely autonomous system of military justice. Whatever its changing structure, this system has been responsible for the knowledgeable, fair, efficient, and reliable administration of criminal law in the military context.

Over two hundred years of experience have seen progress in professionalism, process, and personnel, accelerated by the adoption of

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[2] HOMER E. MOYER, JUSTICE AND THE MILITARY §§ 1-112, 1-113 (1972).

[3] U.S. CONST. art. I, § 8, cl. 14.

the Uniform Code of Military Justice ("UCMJ") in 1950.[4] The operation of that system of law is modern and comprehensive. The UCMJ established not only a code of substantive and procedural law, but also a tiered system of judicial review, including intermediate appellate courts, culminating in the United States Court of Appeals for the Armed Forces, formerly the United States Court of Military Appeals.[5] The Military Justice Acts of 1968[6] and 1983[7] improved standards for court-martial personnel[8] and added certiorari jurisdiction in this Court.[9] With a jurisdiction that is world-wide[10] and extends to any offenses committed by service members, without regard to their nature or service connection, *Solorio v. United States*, 483 U.S. 435 (1987), an annual appellate caseload in excess of 3400,[11] a high court with over 1,000 dispositions in its most recent reporting year,[12] and over thirty thousand

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[4] Pub. L. No. 81-506, 64 Stat. 107, 149, eff. May 31, 1951.
[5] UCMJ arts. 67, 141-45, 10 U.S.C. §§ 867, 941-45.
[6] Pub. L. No. 90-632, 82 Stat. 1335.
[7] Pub. L. No. 98-209, 310(a)(1), 97 Stat. 1405.
[8] UCMJ arts. 26, 66, 10 U.S.C. §§ 826, 866.
[9] UCMJ art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259.
[10] UCMJ art. 5, 10 U.S.C. § 805.
[11] USCAAF, Annual Report of the Code Committee on Military Justice, Appendix (for the period Oct. 1, 2006 to Sept. 30, 2007).
[12] *Id.*

lawyers admitted to its bar,[13] this country's system of military law well deserves the description of one commentator as "The nation's largest criminal jurisdiction."[14]

As such, the military justice system bears the same heavy responsibility as state and federal civilian courts to administer justice fairly, reliably and efficiently. The thousands of service members tried each year are at risk of the same severe consequences as civilian defendants, up to and including the death penalty, which has been imposed in at least fifteen cases since the military death penalty was restored in 1984.[15]

Since the adoption of the UCMJ, this Court has recognized the seriousness and dignity of court-martial proceedings, moving beyond the rough-and-ready system of Colonel Winthrop's day to the holding of *Solorio*, extending jurisdiction to all offenses by service members as a matter of status, and concluding that "civil courts are ill equipped to establish policies regarding matters of military

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[13] 2 JONATHAN LURIE, PURSUING MILITARY JUSTICE, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980, xi (1998).

[14] John T. Willis, *The United States Court of Military Appeals – "Born Again"*, 52 Indiana Law Journal 153 (1976).

[15] Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 Mil. L. Rev. 1, 17 (2006)

concern...." *Solorio*, 483 U.S. at 448. More recently, Congress expressed its reliance on, and confidence in, the military justice system, by extending its jurisdiction to cover "[I]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field," UCMJ art. 2(a)(10), 10 U.S.C. § 802(a)(10). There can no longer be any doubt that this court system bears all the essential elements of a fully-developed organization of criminal justice.

Amici, who have for decades been involved at the highest levels of the military justice system, and are committed to the fair administration of justice for the community it serves and for the nation at large, are gravely concerned about the implications of the Government's attempt to dismantle a critical part of that system.

II

THE POWER TO CORRECT ERRORS IS AN ESSENTIAL FEATURE OF COMMON LAW, STATUTE AND DECISIONAL LAW IN THE CIVILIAN AND MILITARY COURT SYSTEMS

There can be no more basic requirement of a legitimate judicial system than the need to

reach a just result.[16] The power to correct errors in order to ensure such a result has long been regarded as an inherent attribute of all courts. The very purpose of appellate courts derives from the recognition of both the possibility of error and the need to correct it. Their power is not limited to direct review on appeal, but extends in appropriate cases to collateral review when necessary to prevent injustice.

A. Writs of Error *Coram Nobis* At Common Law

Some courts have characterized their powers to prevent injustice and preserve the integrity of the judicial process, even after the time for direct appeal has passed, as inherent in the nature of courts. *E.g., Dye v. Kansas State Supreme Court,* 48 F.3d 487 (10th Cir. 1995); *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987), *citing Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268 (D.C. Cir. 1971); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 965 (1st Cir. 1973); *Clarke v. Boysen*, 273 F. 923 (8th Cir. 1921). More commonly, the traditional vehicle employed is identified as the common law writ of error *coram nobis*, which was available at both King's Bench and Common Pleas to correct fundamental errors of fact or

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[16] *Cf.* Fed. R. Crim. P. 2, which provides that, "These rules are to be interpreted to provide for the just determination of every criminal proceeding...."

law that were not known when judgment was rendered, and for which other appellate or statutory remedies were unavailable.[17] The writ was apparently first recognized in the federal courts by Chief Justice Marshall in *Strode v. The Stafford Justices*, 23 F. Cas. 236, 236-37 (C.C.D. Va. 1810) (No. 13,537).

This Court had occasion to describe the history and availability of the writ of error *coram nobis* in *United States v. Morgan*, 346 U.S. 502 (1954), where it noted that, "While the occasions for its use were infrequent, no one doubts its availability at common law.... It has been used, in the United States, with and without statutory authority but always with reference to its common-law scope – for example, to inquire as to ... failure to advise of right to counsel." 346 U.S. at 508-09 (citations omitted).

The particular function of the writ of error *coram nobis* is to avoid miscarriage of justice in cases of continuing risk of civil disability, where appellate and statutory remedies are unavailable, and when, because the applicant is not in custody, *habeas corpus* relief is inappropriate. It is available to correct errors "of the most fundamental character," *United States v. Mayer*, 235 U.S. 55, 69 (1914),

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[17] *Dobie v. Commonwealth*, 198 Va. 762, 768-69, 96 S.E.2d 747, 752 (1957).

among which is violation of the right to counsel, *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Walker v. Johnston,* 312 U.S. 275 (1941). The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

This Court has specifically recognized that exposure to deportation on the basis of a criminal conviction is a form of civil disability that renders exercise of the court's power to correct errors appropriate. *Fiswick v. United States*, 329 U.S. 211 (1946) (granting relief over claim of mootness where sentence had been served). Again, in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), this Court rejected a jurisdictional challenge to collateral review of court-martial proceedings, because the consequences of a court-martial conviction extend beyond confinement to potential deprivation of pay and dismissal from the service. Much more serious are the consequences in the case at bar, where respondent faces deportation. *Lehmann v. United States*, 353 U.S. 685, 691 (1957) (Black, J., concurring) ("To banish respondent from home, family, and adopted country is punishment of the most drastic kind....")

Failure to provide adequate counsel is a common theme of *coram nobis* cases, in both the civilian and military courts. *Morgan* itself involved such a claim, as did *United States v.*

Michaud, 925 F.2d 37 (1st Cir. 1991), *Spence v. Dowd*, 145 F.2d 451 (7th Cir. 1944), and *Tillman v. United States*, 32 M.J. 962 (A.C.M.R. 1991).

B. Writs of Error In Statutory Law

In codifying the All Writs Act as part of Title 28 in 1948, Congress was "making explicit the right to exercise powers implied from the creation of such courts [*i.e.*, "courts established by Act of Congress"]". Reviser's Note, Historical and Revision Notes, 28 U.S.C. § 1651(a). The Reviser's Note was quoted with approval in *Morgan*, 346 U.S. at 506 n. 6, and again in *Noyd v. Bond*, 395 U.S. 683, 695 n. 7 (1969), which concerned a court-martial sentence. In concluding that the writ was available as a distinct remedy, *Morgan* explicitly disposed of the Government's arguments that either Civil Rule 60(b) (now Rule 60(e)), abolishing "bills in the nature of ...writs of coram nobis" in civil proceedings, or 28 U.S.C. § 2255, authorizing collateral review of sentences by prisoners in custody, superseded or abolished *coram nobis* in criminal matters. "Otherwise a wrong may stand uncorrected which the available remedy would right." *Morgan*, 346 U.S. at 512. "As the power to remedy an invalid sentence exists," this Court concluded, "respondent is entitled to an

opportunity to attempt to show that [his] conviction was invalid." *Id.* at 513.

C. Collateral Review of Errors In Military Courts

Against this background, it was no departure from existing law – and certainly not the arrogation of unauthorized power claimed now by the Government – for the Court of Military Appeals to confirm, in *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966), that it was authorized to entertain and adjudicate applications for writs of error *coram nobis*. *Frischholz* relied on the logic and holding of *Morgan*, the Reviser's Note, and a careful reading of the All Writs Act. It rejected the Government's argument that the Act's explicit grant of jurisdiction to "all courts established by Act of Congress," 28 U.S.C. § 1651(a), was applicable only to Article III courts. Significantly, the petitioner in *Frischholz* had initially applied to the United States District Court, and was turned away with the direction to apply to the Court of Military Appeals. 16 U.S.C.M.A. at 151, 36 C.M.R. at 307.

This Court has left no doubt that *Frischholz* was correctly decided. In *Noyd*, 395 U.S. at 695 n. 7 (1969), it held that *Frischholz* had "properly rejected" the Government's argument that the Court of Military Appeals

was without power to entertain and grant collateral relief, concluding in powerful language that "we do not believe that there can be any doubt as to the power of the Court of Military Appeals" to do so. Indeed, both the Court's opinion and that of the sole dissenter relied on the power of military courts to grant such relief as a basis for criticizing Captain Noyd's initial resort to civilian courts. Justice Harlan, writing for the Court, specifically invoked the "procedure established to police the errors of the tribunal whose judgment is challenged," emphasizing that Congress "deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges[18] could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd*, 395 U.S. at 694.

Six years later, in the face of the Government's claim that Article 76 of the UCMJ, 10 U.S.C. § 876, precludes collateral review of court-martial convictions in *any* court, this Court again expressed its approval of *Frischholz*, stating, "We therefore reiterate the construction given the Art. 76 language in *Gusik* [*v. Schilder*, 340 U.S. 128 (1950)] and accepted by other courts, *including the Court of*

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[18] UCMJ art. 142(b)(1), 10 U.S.C. § 942(b)(1), requires that judges of the Court of Appeals for the Armed Forces (and the Court of Military Appeals before it) "shall be appointed from civilian life."

Military Appeals," *Councilman*, 420 U.S. at 753 (emphasis supplied; adding a footnote quoting with approval the holding in *Frischholz* that Article 76 "has never been held to bar review of a court-martial, when fundamental questions of jurisdiction are involved.")

Congress has several times since *Frischholz*, *Noyd*, and *Councilman* reviewed and amended the UCMJ and the Judicial Code provision governing appellate military jurisdiction, Pub. L. No. 90-632, 82 Stat. 1335; Pub. L. No. 98-209, 310(a)(1), 97 Stat. 1405; UCMJ arts. 26, 66, 10 U.S.C. §§ 826, 866; UCMJ art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259, without ever restricting or eliminating writs of error or other forms of collateral review, or expressing the slightest dissatisfaction with either the existing statutory pattern or the decisional law interpreting it.

At the same time, the Discussion accompanying Rule for Courts-Martial 1204(a)(3) of the Manual for Courts-Martial, the Presidential rules promulgated pursuant to Article 36 of the UCMJ, expressly confirms that the Court of Appeals for the Armed Forces may entertain petitions for extraordinary relief and, in the words of the All Writs Act, "may issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and

principles of law." R.C.M. 204(a)(3) (Discussion) (2008 ed.)[19]

The military appellate courts, in justifiable reliance on this Court's twice-expressed approval, continue to entertain writs of error to review defective courts-martial. *E.g.*, *Tillman v. United States*, 32 M.J. 962, 965 (A.C.M.R. 1991) (granting writ of error *coram nobis* for ineffective assistance of counsel, noting that "the exercise of extraordinary power in the nature of *coram nobis* involves no more than a court reconsidering its own acts to avoid a miscarriage of justice"); *Thompson v. United States*, 60 M.J. 880 (N.M. Ct. Crim. App. 2005) (granting writ where accused was found not competent to have participated in his appeal). Recognizing the extraordinary nature of such relief, they have done so sparingly, leading respected commentators to conclude, "The fact that the court [of Appeals] can issue extraordinary writs does not mean that it will grant them. Most petitions are unsuccessful." FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 25-90.00 at 25-56 n. 355 (2d ed. 1999) (collecting cases). The

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[19] The Manual adds that, "in the interest of judicial economy, such petitions usually should be filed with and adjudicated before the appropriate Court of Criminal Appeals prior to submission to the Court of Appeals for the Armed Forces" – precisely what respondent did here. *Id.*

Court of Appeals is hardly, as the Government's petition for certiorari (though not its brief on the merits) argued, a court out of control in need of chastisement. The military appellate courts, rather, have taken seriously their obligations, recognized by this Court, to achieve justice through the policing and correction of errors.

III

THE GOVERNMENT'S RENEWED ATTEMPT TO STRIP THE MILITARY COURTS OF THEIR ABILITY TO CORRECT ERRORS ON COLLATERAL REVIEW IS BASED ON ERRONEOUS INTERPRETATIONS OF LAW AND A MISUNDERSTANDING OF THE MILITARY SYSTEM, AND IS DETRIMENTAL TO THE FAIR ADMINISTRATION OF JUSTICE

The Government concedes, albeit in a footnote (Gov't Brief at 28 n. 6), that this Court in *Noyd* upheld the military courts' power to grant emergency writs in appropriate cases. Whatever this Court decides on the facts of this case, there is no basis for stripping the military courts of their crucial power of collateral review.

A. Article 76 Is No Bar to Collateral Review

The Government contends that Article 76 of the UCMJ, 10 U.S.C. § 876, bars collateral review in the military courts after direct appeals are concluded. Such a position is squarely inconsistent with *Councilman*'s favorable citation of *Frischholz*, and its conclusion that Article 76 "has never been held to bar review of a court-martial when fundamental questions of jurisdiction are involved." *Councilman*, 420 U.S. at 753 n. 26.

Moreover, the Government's reading of Article 76 proves too much, because it would bar collateral review not only in Article III courts, as well, but even in the Article I Court of Federal Claims action that the Government elsewhere in its brief (at 11, 35) posits as an alternative avenue for relief. There is nothing in the statute – which grants jurisdiction over collateral review to all "courts established by Acts of Congress" – or in the decisional law, that supports a claim that Article 76, while permitting collateral review in civilian courts, forbids it in military courts. The Government in *Councilman* disclaimed any such distinction, and wisely so in light of *Noyd*, which criticized the petitioner's initial resort to civilian courts rather than the military courts "established to police errors of the tribunal whose judgment is

challenged." *Noyd* 395 U.S. at 694. On this point, *Councilman* and *Noyd* are conclusive.

Nor does it do the Government's argument much good to point to hypothetical alternative grounds for relief under Article 73, the Tucker Act, or suits in the Court of Federal Claims, when no such relief is available to this respondent. It is precisely for such circumstances that *coram nobis* exists.

B. The Government Concedes the Inherent Power of Military Courts to Grant Collateral Relief

Perhaps recognizing the weak underpinnings of its all-out attack on collateral review in military courts, the Government elsewhere concedes that those courts do have inherent power to issue writs, both *before* Article 76 finality (for which (at 26 n. 5) it invents the term "interstitial military-court jurisdiction") and *after* the completion of the appellate process, despite Article 76. The Government nevertheless attempts to draw an artificial distinction, unsupported by authority, conceding the existence of inherent, non-statutory power to enforce a judgment, but denying such power to correct a judgment later found to be wrong. This purported distinction is manufactured out of whole cloth, and has no basis in statute or case law. Indeed, at least

since *Johnson v. Zerbst*, 304 U.S. 458 (1938), clarified that the lack of effective assistance of counsel impairs a court's jurisdiction, the distinction is entirely artificial. In any event, to concede a court's inherent power to set aside a jurisdictional defect, but not a Constitutional one, is to swallow the camel but strain at the gnat, and to deny the most fundamental function of judicial review.

C. *Clinton v. Goldsmith* Is Not to the Contrary

The Government's citation of *Clinton v. Goldsmith*, 526 U.S. 529 (1999), need not long detain this Court. The fundamental difference between this case and *Goldsmith* is that Major Goldsmith's application challenged not the actions or validity of a court-martial, but an executive action over which the military courts neither had nor ever claimed jurisdiction. Indeed, in defining the military courts' collateral jurisdiction to extend to the findings and sentences of courts-martial (as in the case at bar), *Goldsmith* reaffirmed that "military appellate courts are among those empowered to issue extraordinary writs under the [All Writs] Act." 526 U.S. at 534. The authors of COURT-MARTIAL PROCEDURE, *supra*, §25-90.00 at 25-60, are unquestionably correct when they conclude that the issue in *Goldsmith* is a "far cry" from the issue of assistance of counsel.

D. The Government's Claims of Undue Burden are Mistaken and Irrelevant

Finally, the Government's claim that permitting collateral review will strain judicial resources is belied by history, and in any event pales beside the value of rendering judgments free of Constitutional error.

The military courts, like the civilian courts, have a long history of entertaining applications for collateral relief. Being in the best position to know, they offer no complaint of burden, and have, indeed, been exceptionally sparing in their grants of relief. They have developed suitable procedures for conducting post-trial proceedings, *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), which constitute a minuscule portion of their dockets.

Even if such proceedings did constitute a substantial portion of the court's work, perceived workloads should not deter the use of appropriate procedures to attain just results. This Court has long adhered to the spirit of Judge Learned Hand's maxim, "Thou Shalt Not Ration Justice,"[20] in requiring the appointment of counsel, *Gideon v. Wainwright*, 372 U.S. 335

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[20] Delivered on the occasion of the 75th anniversary celebration of the Legal Aid Society of New York, February 16, 1951; *quoted in Hardy v. United States*, 375 U.S. 277, 293-94 (1964) (Goldberg, J., concurring).

(1963), *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and, more recently, in extending judicial power over extraordinary writs sought by prisoners in military custody, *Boumediene v. Bush*, 553 U.S. ____, 128 S.Ct. 2229, 2261 (2008). Moreover, the Government's solution of directing collateral review to Article III courts, besides being disfavored by *Noyd*, offers no appreciably cheaper solution.

* * *

The Government was right when it argued to the District Court in *Frischholz* that

> The Court of Military Appeals is a court established by Act of Congress, 10 U.S.C. § 867, and it should necessarily follow that that Court should have the same authority under 28 U.S.C.A. 1651(a) that the Supreme Court in the *Morgan* case recognized in civil courts in criminal cases arising and heard in United States District Courts.[21]

The Government was again right when, through the General Counsel of the Department of Defense, it presented testimony concerning

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[21] Government Motion to Dismiss at 7, *Frischholz v. Sec'y of the Air Force* (D.D.C. Apr. 7, 1965) (No. 64-1915).

the availability of collateral review in military appellate courts. The Government's brief (at 26 n. 5) cites this very testimony, but omits its crucial conclusion:

> [C]ases that were subject to Court of Military Review jurisdiction may be reviewed by the Courts of Military Review or the Court of Military Appeals on writs of *coram nobis*.[22]

Those two Government statements correctly set forth the applicable law. This Court should not now lightly take the Government's opportunistic reversal of its position as authoritative.

CONCLUSION

It is a mystery how depriving a court system of its power to correct errors contributes to justice, good order or military discipline. The Government's about-face on collateral review represents an attempt to deny that military courts have the essential attributes of courts to assure the integrity of their judgments.

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[22] *Military Justice Act of 1982, Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. On Armed Services*, 97th Cong. (1982) (statement of William H. Taft IV, General Counsel, Dep't of Defense).

A system of criminal law as essential, comprehensive and active as that established by Congress for the United States military is a serious business, and bears a heavy responsibility to its participants and the nation. Review by civilian courts is extremely rare. Military courts need to get it right, and should not be denied the power to do so, especially in the extraordinary case of serious deprivation of rights in which no other remedy is available.

The Government's position is dismissive of the military justice system and its goal and ability to render fair, credible judgments in which the participants, the law and the country can have confidence.

The judgment of the Court of Appeals should be affirmed.

February 17, 2009

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JACOB DENEDO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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INTEREST OF *AMICI CURIAE*[1]

The significant issues raised by this case include (1) the ability of courts with criminal jurisdiction to provide remedies for constitutional errors at trial; (2) the role played by Article III courts in providing collateral relief for convictions obtained in state courts, and in Article III and non-Article III federal courts; (3) the specific interaction between Article I military courts and Article III courts; and (4) the applicability of the canon of statutory interpretation disfavoring repeals of jurisdiction by implication.

Amici curiae, listed in Appendix A, are professors teaching the law of federal jurisdiction, criminal procedure, and post-conviction remedies. *Amici* join together to provide the Court with their understanding of the application of different strands of the relevant jurisprudence to the lawfulness of the potential relief—the writ of *coram nobis*—that the Court of Appeals of the Armed Forces (CAAF) has ordered to be considered for Respondent. *Amici* share the view that the probable existence of a post-conviction remedy in Article III courts does not divest the military courts of their authority to resolve

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1. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party nor a party itself made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

post-conviction claims of ineffective assistance of counsel that would—if left unredressed—result in the Respondent's deportation.

SUMMARY OF ARGUMENT

At issue in this case is whether the courts of appeals in the military justice system—including the Court of Appeals for the Armed Forces (CAAF) and the Navy-Marine Corps Court of Criminal Appeals (N-MCCA)—have the power to issue writs of *coram nobis*[2] to respond to unlawful convictions. The CAAF answered this question in the affirmative. *See Denedo v. United States*, 66 M.J. 114 (C.A.A.F.), *cert. granted*, 129 S. Ct. 622 (2008). Nonetheless, the Government argues that because Article III courts have authority under certain circumstances to hear ineffective assistance of counsel claims such as those presented by the Respondent, the military courts of appeals do not.

In the Uniform Code of Military Justice (UCMJ), Congress conferred upon the military courts jurisdiction to conduct criminal proceedings via courts-martial. As "courts established by Act of

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2. As an appellate court, the N-MCCA would fashion relief in the form of a writ of *coram vobis*, rather than *coram nobis*. *See Ex parte Lange*, 85 U.S. (18 Wall.) 163, 196 (1873). Like the traditional distinction between common-law writs of mandamus and prohibition, that semantic clarification is "virtually meaningless" today. *See United States v. Sawyer*, 239 F.3d 31, 37 n.4 (1st Cir. 2001). *See generally* Note, *The Need for Coram Nobis in the Federal Courts*, 59 YALE L.J. 786 (1950) (discussing the background and purpose of the writ).

Congress," courts-martial and the military courts of appeals are thereby authorized by the All Writs Act, 28 U.S.C. § 1651, to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Under this Court's decision in *United States v. Morgan*, 346 U.S. 502, 512 (1954), that authority includes the power to issue writs of *coram nobis* in appropriate cases.

No Act of Congress provides to the contrary. Article 76 of the UCMJ, 10 U.S.C. § 876, states only that, upon the conclusion of direct appellate review, "the proceedings, findings, and sentences of courts-martial . . . are final and conclusive." This provision does not speak to the power of the military courts to fashion collateral relief, and this Court disfavors repeals of jurisdiction by implication. *See, e.g., Felker v. Turpin*, 518 U.S. 651, 660 (1996) (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869)).

As Justice Powell explained in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Id.* at 752. *Councilman* thus held that Article 76 did not preclude collateral review of courts-martial in the Article III courts, whether through habeas corpus or *other* available remedies. *See id.* at 749-51. Given that Congress and this Court's jurisprudence generally require exhaustion of remedies in the courts (both Article III and non-Article III) from which the convictions issued as a

predicate to Article III review, the *Councilman* precept applies to the military justice system as well.

To require litigants to resort first to collateral review in the Article III courts, rather than to post-conviction remedies available in the court system in which they were convicted, would be inconsistent with the fabric of post-conviction remedies, as developed under both state and federal case law and statutes. The exhaustion doctrine is based on considerations of comity and pragmatism, as it posits that the judicial system responsible for the conviction is generally able and well-suited to conduct the requisite post-conviction review. Such collateral proceedings are especially critical in cases raising ineffective assistance claims, which often require fact-finding outside the record about a lawyer's alleged constitutionally inadequate representation. *See Massaro v. United States*, 538 U.S. 500 (2003).

The jurisprudence of exhaustion recognizes the authority and utility of this sequencing in protecting Article III courts from having to act when they need not, thereby avoiding unnecessary decisions about the administration of criminal justice by non-Article III tribunals. Article III review remains available in most cases as a necessary stopgap, but generally as the last—rather than the first or only—resort. Congress has not directed to the contrary, and, absent a clear statement of congressional intent, neither should this Court.

ARGUMENT

I. THE POSSIBLE AVAILABILITY OF ARTICLE III REVIEW IS NOT A BASIS FOR INFERRING THAT POST-CONVICTION RELIEF IS UNAVAILABLE IN THE MILITARY COURTS.

A. Article III Courts Have Jurisdiction to Entertain Collateral Challenges to Convictions Obtained in Their Own Courts, in State Courts, and in Non-Article III Federal Courts, Including Courts-Martial.

Decisions by both this Court and the lower federal courts consistently recognize the authority of the Article III courts to entertain collateral attacks on convictions rendered by courts-martial under the UCMJ. The basis for such jurisdiction has varied depending on the nature of the relief sought and includes 28 U.S.C. §§ 1331, 1361, 2201, and 2241. *See, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 537 n.11 (1999) (recognizing authority under § 2241); *Davis v. Marsh*, 876 F.2d 1446, 1448 & n.4 (9th Cir. 1989) (recognizing authority under § 2201); *Baker* v. *Schlesinger*, 523 F.2d 1031, 1034-35 (6th Cir. 1975) (recognizing authority under § 1361); *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 406 (D.C. Cir. 2006) (recognizing authority under § 1331), *cert. denied*, 127 S. Ct. 2096 (2007). *See generally Councilman*, 420 U.S. at 746-48.[3]

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[3] The Government states that remedies in the Article III courts remain available to individuals in Respondent's position. *See* U.S. Br. at 34.

More generally, Article III courts have jurisdiction to entertain collateral challenges to convictions rendered in their own courts, as well as in state courts and non-Article III courts providing criminal processes—including territorial courts, the D.C. Superior Court, and the military justice system. The prototype for such review is the Habeas Corpus Act of 1867, the relevant provisions of which are codified as amended at 28 U.S.C. § 2254, which, together with the jurisdictional grant in 28 U.S.C. § 2241, provides the federal courts with jurisdiction to hear challenges to state-court convictions.

Congress has authorized comparable review of federal-court convictions through 28 U.S.C. § 2255; prisoners "in custody under sentence of a court established by Act of Congress" are authorized to file motions for post-conviction relief in the sentencing court that are functionally equivalent to habeas corpus. *See* 28 U.S.C. § 2255(a); *Hill v. United States*, 368 U.S. 424, 427-28 & n.5 (1962).[4] Further, in a statute modeled on § 2255, Congress has provided for such review when a defendant is convicted in the D.C. Superior Court. *See* D.C. CODE § 23-110; *see also Swain* v. *Pressley*, 430 U.S. 372, 379-81 (1977).

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[4] The text of § 2255 suggests that it may be invoked by any "prisoner in custody under sentence of a court established by Act of Congress," hence potentially including courts-martial. Section 2255 has been interpreted as not being available to court-martial defendants. *See, e.g., Witham v. United States*, 355 F.3d 501, 505 (6th Cir. 2004).

B. Under the All Writs Act, Article III Courts Have Jurisdiction to Issue Writs of *Coram Nobis* to Set Aside Convictions Rendered in Their Own Trial Courts.

Article III courts have the power under the All Writs Act, 28 U.S.C. § 1651, to issue writs of *coram nobis* to set aside federal convictions, as this Court held in *United States v. Morgan*, 346 U.S. 502 (1954). *See also United States v. Mayer*, 235 U.S. 55 (1914); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).[5] Although *coram nobis* is an unusual remedy, it continues to have significance in a specific class of cases:

> The writ of *coram nobis* is an extraordinary remedy available to a petitioner no longer in custody who seeks to vacate a criminal conviction in circumstances where the petitioner can demonstrate civil disabilities as a consequence of the conviction, and that the challenged error is of sufficient magnitude to justify the extraordinary relief.

United States v. Esogbue, 357 F.3d 532, 534 (5th Cir. 2004) (internal quotation marks omitted); *see also* Ira P. Robbins, *The Revitalization of the Common-Law Writ of Audita Querela as a Postconviction Remedy in Criminal Cases: The Immigration Context and Beyond*, 6 GEO. IMMIGR. L.J. 643, 665-68

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5. The lower federal courts have not recognized the availability of *coram nobis* in cases involving state-court judgments. *See, e.g., Finkelstein v. Spitzer*, 455 F.3d 131, 133-34 (2d Cir. 2006) (per curiam).

(1992) (summarizing circumstances in which post-*Morgan* courts have found *coram nobis* relief appropriate). *See generally* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 41.2b, at 1919-21 (5th ed. 2005). As Judge Edwards has explained, "[t]he teaching of *Morgan* is that federal courts may properly fill the interstices of the federal post-conviction remedial framework through remedies available at common law." *United States v. Ayala*, 894 F.2d 425, 428 (D.C. Cir. 1990).

In *Morgan*, the Court rejected the Government's argument that the power to fashion *coram nobis* relief was superseded by Congress's 1948 provision of collateral review in § 2255.[6] Instead, Justice Reed invoked the Court's ruling in *United States v. Hayman*, 342 U.S. 205 (1952), for the proposition that § 2255 was intended to streamline habeas corpus proceedings, while not precluding other forms of collateral review. *See* 346 U.S. at 510-11 (citing *Hayman*, 342 U.S. at 219).

Morgan is also thus part of a line of decisions rejecting arguments that Congress has implicitly divested the federal courts of their jurisdiction. *See, e.g., Demore v. Kim*, 538 U.S. 510, 533-34 (2003) (O'Connor, J., concurring in part and concurring in the judgment); *INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001); *see also* Gerald L. Neuman, *The Habeas*

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6. *Morgan* has particular relevance to this case in that it recognized the appropriateness of *coram nobis* as a remedy for violation of the defendant's Sixth Amendment right to counsel. *See* 346 U.S. at 507-08, 511-12.

Corpus Suspension Clause After INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555 (2002). *See generally* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1553-56 (2000) (noting the relationship between the presumption against implied repeals and the constitutional avoidance canon).

C. Congress and this Court Require Defendants to Exhaust Available Post-Conviction Remedies in the Courts in Which Their Conviction Originated Before Seeking Collateral Article III Review.

The availability of collateral Article III review does not constrain the scope of post-conviction remedies in the judicial system in which the conviction was obtained. State courts routinely provide their own forms of collateral post-conviction relief, including, in many jurisdictions, *coram nobis*. *See, e.g.*, 1 Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook* § 2:4, at 35 (2008-2009 ed.). Moreover, Congress and this Court have not only recognized the availability of such remedies but have generally required their exhaustion before defendants may invoke the collateral powers of the Article III courts. *See, e.g.*, 28 U.S.C. § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, *by any available procedure*, the question presented." (emphasis added)); *see also Coleman v.*

Thompson, 501 U.S. 722 (1991). *See generally Ex parte Royall*, 117 U.S. 241 (1886).

Post-conviction fact-finding stands in a special relationship to a small set of collateral claims, of which ineffective assistance of counsel is a leading example. In *Massaro v. United States*, 538 U.S. 500 (2003), which held that a defendant does not default an ineffective-assistance claim by failing to raise it on direct appeal, Justice Kennedy emphasized how, "[u]nder the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Id.* at 505; *see also Murray v. Giarratano*, 492 U.S. 1, 24-26 (1989) (Stevens, J., dissenting); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 325 (1988).

As Justice Kennedy acknowledged in *Massaro*, many ineffective assistance cases turn on evidence that is outside the trial record. *See* 538 U.S. at 504-06; *see also, e.g.*, *Rompilla v. Beard*, 545 U.S. 374 (2005) (granting habeas relief based upon the record created in state post-conviction proceedings); *Wiggins v. Smith*, 539 U.S. 510 (2003) (same). To that end, even where defendants *are* able to raise such claims in a direct appeal, the lower federal courts have suggested that an ineffective assistance claim "is more appropriately raised through a post-conviction motion brought pursuant to 28 U.S.C. § 2255." *United States v. Campbell*, 549 F.3d 364, 377 (6th Cir. 2008).

Post-conviction review in the courts in which the conviction originated thus serves dual purposes: it provides an opportunity for the defendant to introduce evidence not in the trial record, and it places initial adjudicatory responsibility in the same courts in which the conviction was obtained. This sequencing reflects the principle that collateral remedies in the Article III courts come as the last resort, rather than the first. In the most common context, the purpose of this rule is to "protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

The background to 28 U.S.C. § 2255 reveals another reason for such sequencing, predicated on efficiency rather than federalism. The enactment of § 2255 was a response to the logistical problems attendant to collateral review of federal convictions in the 1940s. Then, federal prisoners were required to seek habeas corpus relief in their district of confinement. *See, e.g.*, *Ahrens v. Clark*, 335 U.S. 188 (1948), *overruled in part by Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973). Because the overwhelming majority of federal prisoners were housed in five prisons, the rule placed the greatest burden on five district courts. *See Hayman*, 342 U.S. at 214 & n.18; *see also* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 904-07 (1984) (summarizing the background); Robbins, 6 GEO. IMMIGR. L.J., at 663-64 (same).

In addition to the volume of cases, those courts' distance from the courts in which the defendants

were sentenced created a separate set of difficulties—in obtaining trial records or relevant witnesses to testify at evidentiary hearings. *See Hayman*, 342 U.S. at 212-14. Thus, as Chief Justice Vinson explained,

> the few District Courts in whose territorial jurisdiction major federal penal institutions are located were required to handle an inordinate number of habeas corpus actions far from the scene of the facts, the homes of the witnesses and the records of the sentencing court solely because of the fortuitous concentration of federal prisoners within the district.

Id. at 213-14.

To reduce these problems, Congress provided an alternative to habeas corpus under 28 U.S.C. § 2241, requiring that defendants file motions for post-conviction relief in the court in which they were convicted. Congress thus provided that review under § 2255 would be in lieu of review under § 2241 "unless . . . the remedy by motion is inadequate or ineffective to test the legality of [the defendant's] detention." 28 U.S.C. § 2255(e). As this Court observed last Term, "[t]he purpose and effect of the statute was not to restrict access to the writ but to make postconviction proceedings more efficient. It directed claims not to the court that had territorial jurisdiction over the place of the petitioner's confinement but to the sentencing court, a court already familiar with the facts of the case." *Boumediene v. Bush*, 128 S. Ct. 2229, 2264 (2008).

D. This Court Has Applied an Exhaustion Requirement for Challenges to Court-Martial Convictions Parallel to That Which Congress Has Required for Challenges to Convictions in State and Federal Civilian Courts.

Pragmatism and comity have produced comparable requirements for the military system. In *Councilman* and *Gusik v. Schilder*, 340 U.S. 128 (1950), this Court applied the exhaustion principle to the military justice system created by Congress. As Justice Douglas explained in *Gusik*, requiring the exhaustion of remedies in the military justice system before resorting to the Article III courts serves similar purposes as the exhaustion requirement for state-court defendants. *See* 340 U.S. at 131-32; *see also id.* at 132 ("If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless.").

Moreover, in *Councilman*, Justice Powell rejected the general power of the Article III courts to conduct *ex ante* habeas review of a court-martial.[7] As he explained,

> [J]udgments of the military court system remain subject in proper cases to collateral

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[7] *Councilman* reaffirmed an important exception to the exhaustion requirement—where defendants seek to challenge their amenability to military jurisdiction in the first place. *See* 420 U.S. at 758-59; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 585 n.16 (2006); *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969).

> impeachment. But implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights. We have recognized this, as well as the practical considerations common to all exhaustion requirements, in holding that federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted.

420 U.S. at 758; *see also Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality) ("In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted."); *cf. Khadr v. Bush*, 587 F. Supp. 2d 225, 230 (D.D.C. 2008) (noting the significance of "*Councilman* abstention" in declining to entertain a pre-trial habeas petition challenging a military commission).

As noted by the CAAF, *see Denedo*, 66 M.J. at 123 (citing cases), these precepts are the basis for decisions of several district courts holding that the court-martial defendants failed to exhaust their available military remedies by failing to pursue

coram nobis relief. *See also Parker v. Tillery*, No. 95-3342-RDR, 1998 WL 295574, at *2 (D. Kan. May 22, 1998) (holding that *coram nobis* review in the military justice system demonstrated full and fair review of claim). In short, the pattern that emerges is one in which, despite the different sources of law, criminal defendants are first to seek post-conviction relief in the courts responsible for the conviction.

II. THE UNIFORM CODE OF MILITARY JUSTICE DOES NOT PRECLUDE COLLATERAL POST-CONVICTION REVIEW IN THE MILITARY COURTS.

A. Congress Authorized the Military Court System to Enter Convictions and to Review Them Collaterally.

Congress has empowered the military courts to provide post-conviction remedies, both on appeal and as a collateral matter. *See Burns*, 346 U.S. at 141 (plurality); *see also Gusik*, 340 U.S. at 131-32. In *Councilman*, 420 U.S. at 753 & n.26, this Court quoted with approval the decision of the CAAF's predecessor—the United States Court of Military Appeals—in *United States v. Frischholz*, 36 C.M.R. 306 (C.M.A 1966), which upheld the power of the military courts under the All Writs Act to issue writs of *coram nobis*, even while denying the petitioner's claim on the merits. *Id.* at 308-09.

To similar effect is *Noyd*, which noted that *Frischholz* "properly rejected the Government's argument" that the military courts of appeals are powerless to provide collateral post-conviction relief. 395 U.S. at 695 n.7. Like state courts and non-

Article III federal courts such as the territorial courts and the D.C. Superior Court—if not more so—the military's judicial system is designed to function as a complete whole, able both to provide all of the procedural protections at trial required by the Constitution and to provide remedies when those protections go unobserved.

B. The All Writs Act Supports the Jurisdiction of the Military Courts of Appeals to Issue Writs of *Coram Nobis* in Appropriate Cases.

Relying upon *Noyd* and *Councilman*, the CAAF has sustained its own jurisdiction to entertain various applications for collateral relief, including *coram nobis* and relief in the form of habeas corpus under the All Writs Act. *See Loving v. United States*, 62 M.J. 235, 246-47 (C.A.A.F. 2005). Such analysis is consistent with the recognition of the power of other non-Article III courts to exercise All Writs Act authority. *See, e.g., United States v. Hamid*, 531 A.2d 628 (D.C. 1987); *see also United States v. Cogdell*, 585 F.2d 1130, 1133-34 (D.C. Cir. 1978) (upholding the D.C. Superior Court's power under the All Writs Act), *rev'd on other grounds sub nom. United States v. Bailey*, 444 U.S. 394 (1980).

This Court's decision in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), does not counsel to the contrary. That decision held that the CAAF exceeded the scope of its jurisdiction under the All Writs Act in affording relief to an Air Force officer who claimed he had been unlawfully dropped from the rolls. The power the CAAF claimed there was not a power to correct a

constitutional error in a defendant's court-martial, but to correct executive action. As Justice Souter explained, "the Air Force's action to drop respondent from the rolls was an executive action, not a 'findin[g]' or 'sentence' that was (or could have been) imposed in a court-martial proceeding." *Id.* at 535 (alterations in original; citation omitted); *see also id.* at 536 (rejecting Goldsmith's alternative argument on the ground that he did not challenge his conviction, but rather the "independent action" of "another military agency").

By contrast, the central feature of *coram nobis* is to provide a means for an individual no longer in custody to revisit a conviction in light of fundamental claims that could not have been before the trial court. Thus, ineffective assistance of counsel claims present the paradigmatic case for *coram nobis* relief because: (1) they depend on evidence not available at trial; (2) they may not be properly cognizable in a direct appeal, or the direct appeal may be time-barred by the time the relevant evidence is uncovered; and (3) they go to the fundamental fairness of the underlying proceeding—perhaps even to the trial court's jurisdiction.[8]

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[8] As this Court has explained,

> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.

Johnson v. Zerbst, 304 U.S. 458, 467 (1938).

Respondent here is no longer in the military and does not request relief that would involve a court—military or civilian—directing the military about how to assign its personnel. Rather, the application for a writ of *coram nobis* necessarily seeks to revise the judgment of conviction—here, the "findings" or "sentence" of a court-martial, a proceeding of the military system that can now be reconsidered by the military system. This review *is* otherwise within the jurisdiction of the intermediate military courts of appeals, including the N-MCCA, pursuant to Article 66 of the UCMJ, 10 U.S.C. § 866(c). As such, and in marked contrast to the relief sought in *Goldsmith*, *coram nobis* is "in aid of" the N-MCCA's jurisdiction over the "findings" and "sentence" of Denedo's court-martial.

C. No Act of Congress Divests the Military Courts from Exercising Their Authority Under the All Writs Act, Nor Should Such Divestment Be Inferred by Implication.

Article 76 of the UCMJ provides that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive." 10 U.S.C. § 876. This Court in *Councilman* emphasized, however, that finality under Article 76 is a prudential—rather than jurisdictional—constraint. *See* 420 U.S. at 749 (rejecting the argument that "Art. 76 was intended to

bar subject-matter jurisdiction in suits for collateral relief other than by way of habeas"). As Justice Powell explained, "there is no necessary inconsistency between [the finality of a judgment under Article 76] and the standard rule that void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject-matter jurisdiction." *Id.*

Councilman rejected the argument that Article 76 preserved habeas corpus in the Article III courts while eliminating other forms of collateral relief. Instead, the Court concluded that "nothing in Art. 76 distinguishes between habeas corpus and other remedies also consistent with well-established rules governing collateral attack. If Congress intended such a distinction, it selected singularly inapt language to express it." *Id.* at 751.

The text of Article 76 does not speak expressly to the power of the military courts to fashion collateral relief. It should not be read inferentially to divest such jurisdiction. As this Court has made plain, statutes are not to be presumed to repeal jurisdiction by implication. *See, e.g., Felker v. Turpin*, 518 U.S. 651, 660 (1996) (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869)). This "canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Councilman*, 420 U.S. at 752. Thus, while Congress *could* constitutionally limit the jurisdiction of military courts to issue appropriate post-conviction writs—at least as long as some other

remedy remained available[9]—it did not do so in Article 76.

D. By Taking Responsibility for Correcting Fundamental Errors in Courts-Martial, the Military Courts Are Properly Discharging Their Obligations in Relation to Article III Courts.

Throughout the nearly six decades since the UCMJ was enacted, this Court has accorded deference "to the judgments of the carefully designed military justice system established by Congress." *Councilman*, 420 U.S. at 753. Indeed, the limitations on the substantive scope of Article III habeas review of court-martial convictions articulated in *Burns* and its progeny are explained by the "great care" Congress has taken "both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights." *Burns*, 346 U.S. at 140 (plurality). As Justice Harlan described in *Noyd*,

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9. If eliminating *coram nobis* review in the military courts would deprive litigants such as Respondent of any judicial forum for resolution of their constitutional claims, it would raise "serious constitutional questions." *See, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988); *cf. Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (invalidating part of an Act of Congress that effectively precluded habeas corpus review for non-citizens held as "enemy combatants"). *See generally* Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1777-807 (1991).

> When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.

395 U.S. at 694; *see also id.* at 695 (rejecting the possibility that "civilian courts intervene precipitately into military life without the guidance of the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad"). The proposition that Article III review strips CAAF and the N-MCCA of their jurisdiction to provide collateral relief thus gets the relationship between the Article I military judicial system and the Article III courts backwards.

Neither this Court nor Congress has used the availability of Article III redress as a predicate to an absolute bar on a non-Article III court from fashioning appropriate post-conviction relief, and for good reason. To adopt a position of implied jurisdiction stripping based upon the availability of Article III courts would put the onus on the Article III courts to serve as courts of first impression for claims like those brought by the Respondent. *See generally* Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387-89 (1953) (highlighting the difficulties inherent in

requiring habeas courts to resolve factual issues as a matter of first impression). Given the military courts' familiarity with the specific case, the background issues, and the nature of court-martial proceedings more generally, such a rule would be as impracticable as it would be unwise. Thus, "[t]here seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider [Respondent's] arguments." *Noyd*, 395 U.S. at 696.

CONCLUSION

For the aforementioned reasons, *amici* respectfully submit that the decision of the CAAF be affirmed.

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APPENDIX

APPENDIX

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